

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Appellate

77-2035
77-2135

To be argued by
LOUIS G. CORSI

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 77-2035, 77-2135

UNITED STATES *ex rel.* LOUIS WOLFISH, *et al.*,
Relators-Appellees,

—v.—

HONORABLE EDWARD LEVI, *et al.*,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLANTS

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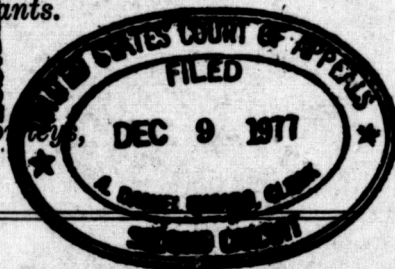


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket Nos. 77-2035, 77-2135

UNITED STATES *ex rel.* LOUIS WOLFISH, *et al.*,
Relators-Appellees,

—v.—

HONORABLE EDWARD LEVI, *et al.*,
Respondents-Appellants.

BRIEF FOR RESPONDENTS-APPELLANTS

Statement of the Case

This is an appeal from the Partial Judgment entered October 13, 1977, as amended, (the "judgment") (A 2883-906*) and the prior Order dated January 19, 1977 (the "summary judgment order") (A 3064-67) of the District Court for the Southern District of New York (Frankel, D.J.) ordering sweeping changes in a broad array of policies, practices and conditions at the Metropolitan Correctional Center (the "MCC"), the new federal detention center located adjacent to this Courthouse which opened in August, 1975.

On November 15, 1977, this Court granted the respondents-appellants' (the "appellants") request for a stay

* Hereinafter, "A . . ." refers to page citations in the Joint Appendix.

of portions of the judgment,* Judge Mulligan noting in the course of those proceedings that this was a case of "first impression" for this Court. Because of the importance of the matters raised by this case, this Court expedited the hearing of this appeal (Order of this Court dated November 15, 1977). In addition, the Court consolidated the appeal from the judgment (Dkt. No. 77-2135) with the previously docketed appeal from the summary judgment order (Dkt. No. 77-2035) (Order of this Court dated November 10, 1977).

Issues Presented

1. Whether the District Court applied the proper constitutional standard in judging the policies, practices and conditions at the MCC.

2. Whether the District Court has authority under (a) the Administrative Procedure Act, 5 U.S.C. §§ 701-06, (b) the Bureau of Prisons' enabling statutes, 18 U.S.C. §§ 4001, 4002, 4042, 4081, 4082, or (c) implied supervisory powers to review the policies, practices and conditions at the MCC.

3. Whether the relief ordered is supported by the facts in this case, or the applicable law.

4. Whether the District Court properly granted summary judgment in favor of the petitioners-appellees ("appellees"), and whether summary judgment should now be granted in favor of the appellants.

* The District Court had previously stayed other portions of the judgment (A 2906).

Statement of Facts

1. Background Proceedings

This action was commenced on November 28, 1975—less than four months after the MCC opened—with the filing of a *pro se* petition for a writ of habeas corpus concerning the conditions of confinement at MCC (A 2) by Louis Wolfish, at the time an inmate at MCC, who is well-known to this Court. See *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975); *United States v. Wolfish*, 538 F.2d 316 (2d Cir. 1976). By order dated December 2, 1975, the District Court certified this action as a class action (A 2). On January 13, 1976, after appointment of counsel by the District Court, an amended petition was filed, and subsequently on February 17, 1976, the appellants filed a return to that petition (A 3).

On January 28, 1976 the District Court preliminarily enjoined the appellants from changing the schedule for visiting hours at the MCC, 406 F. Supp. 1243. On October 1, 1976 the District Court ordered the MCC, through another preliminary injunction, to provide inmates with a special system of local and long distance telephone services (A 329-33), after the New York Telephone Company announced that it intended to remove the then-existing telephones at the MCC because it had incurred a loss of more than \$90,000 in one year as a result of fraudulent long-distance calls made from those telephones (A 227-30).

In January, 1977, upon appellees' motion for partial summary judgment, and appellants' cross-motion, the District Court entered an order prohibiting the MCC from housing more than one inmate in each of the residential rooms at the MCC, and entered further orders concerning the handling by the MCC of mail to and from inmates, prohibiting further enforcement at the MCC of the Bureau-wide "publisher only" rule, and re-

quiring the use of receipts when the MCC confiscates contraband (A 3064-67); several of the appellees' claims were also dismissed (*Id.*). See the District Court's opinion at 428 F. Supp. 333. On March 18, 1977 the appellants filed a notice of appeal which has been docketed under Docket Number 77-2035.

On February 28, 1977 the trial of this action commenced and continued from day-to-day until completed on March 30, 1977. The trial record here is quite voluminous, consisting of more than 3000 pages of transcript and several hundred exhibits. The testimony of 46 witnesses was taken, in court or by way of deposition, and the Court took two unannounced tours of MCC during the course of the trial. By an Opinion dated September 15, 1977 (the "opinion") (A 2691-823), the District Court decided all remaining issues in the amended petition except for the allegations coming under the rubric of "medical care" (A 2815).^{*} At the District Court's direction, the parties submitted proposed forms of judgment, and on October 13, 1977 the judgment was entered (A 2883-906). Subsequently, by memorandum dated October 18, 1977, paragraph 22 of the judgment was amended (2910).

The appellants filed a notice of appeal from the judgment on October 21, 1977, and amended its notice on October 31, 1977 (A 2916). Docket Number 77-2135. As noted above, this Court has stayed, as requested, portions of the judgment and has set an expedited schedule for the briefing and hearing of this appeal, as consolidated with the appeal in Docket Number 77-2035.

^{*} These medical issues are presently being tried before the Hon. Sol Schrieber, U.S. Magistrate, who is sitting as a special master pursuant to the District Court's order dated August 30, 1977.

2. The Record

Except for an introductory discussion on the planning and design of MCC, length of stay, and capacity of the MCC, the evidence developed in the record before the District Court will be discussed as part of the legal arguments below.

A. The Planning and Design of MCC

In February, 1964 the Senate Subcommittee on National Penitentiaries directed the Attorney General to "develop a proposal for the early replacement" of the Federal Detention Headquarters ("West Street") which it characterized as "grossly inadequate for its purpose" of housing pretrial detainees and some sentenced individuals. Hearings before a Subcomm. of the House Comm. on Appropriations, 89th Cong., 1st Sess. (1965), RX-000 * ("1965 Hearings") (A 2371). In seeking planning funds in 1965 to carry out that mandate, the Bureau of Prisons (or the "Bureau") summarized the deficiencies of West Street:

The structure was originally a waterfront garage located in Manhattan and was converted in 1928 into a jail. Its location is undesirable. The critical problems, however, are condition of physical plant, overcrowding because of increased use by the courts, and lack of facilities for separating witnesses from prisoners (*Id.*).

After some preliminary steps were taken in the late 1960's, more detailed planning for West Street's replacement was begun in the early 1970's (Mote** Direct, A

*Hereinafter, "RX—" refers to appellants' trial exhibits; "PX—" refers to appellees' trial exhibits.

** Gary Mote is chief architect for the Bureau of Prisons (RX-BBB, A 2090).

1640-41). In March 1970, the Bureau reported to Congress that a "multi-purpose metropolitan correctional facility" for housing pretrial detainees and some sentenced inmates was planned to replace West Street and presented a short narrative on this proposal. Hearings before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 2d Sess., (1970), RX-QQQ ("1970 Hearings") (A 2376). Subsequently, the Bureau established an interdisciplinary planning team to study and analyze the problem of providing a suitable detention facility in New York City and to prescribe a set of functional and general architectural requirements for such a facility (Mote Direct, A 1641-42). The work and recommendations of that team were embodied in the Bureau's "Tentative Outline of Architectural Requirements for the New York Metropolitan Correctional Center"* (RX-CCC, A 2091-148; see Mote Direct, A 1643).

Seeking input from a variety of sources outside the Bureau, in early 1971, the Attorney General appointed a National Advisory Panel consisting of members with diverse professional backgrounds to review and advise the Bureau on plans for this proposed facility (as well as other facilities under development by the Bureau) (Mote Direct and Cross, A 1644-45, 1661; Carlson ** Direct, A 1673; Menninger *** Direct, A 2709-10). In addition, the Bureau consulted with the local federal courts on the nature and location of this proposed facility (Carlson Direct, A 1673-75).

Subsequently, the architectural commission for the MCC was awarded to the New York firm of Gruzen and

* Hereinafter "Tentative Outline."

** Norman Carlson, Director of the Bureau of Prisons (RX-EEE, A 2281).

***William Walter Menninger, M.D. (RX-ZZ, A 2079-85; RX-AAA, A 2086-89).

Partners (Mote Direct, A 1646-47), an architectural firm well-known for its innovative work in the field of correctional architecture (Nagel * Cross, A 716-17). In commissioning Gruzen to design the MCC, the Bureau

gave them the mandate not only from our staff but also from the national advisory panel, that we wanted them to break tradition and get away from the traditional jail design, to plow new ground if you will and try to create an environment that was a lot more human, a lot more normal, and less destructive or corrosive, if you will, given the fact that probably any kind of detention has some negative aspects to it (Mote Direct, A 1656).

(See Tentative Outline, RX-CCC, A 2096-99; Carlson Direct, A 1673; Menninger Direct, A 1585).

With that mandate and the Tentative Outline serving as its guide, Gruzen developed an architectural program for the MCC which was embodied in the "Final Outline of Architectural Requirements for the Manhattan Metropolitan Correctional Center of the Foley Square Courthouse Annex, April 23, 1971, revised May 12, 1971, approved by Bureau of Prisons, May 13, 1971" (A 2218-80).**

* William Nagel, a correctional expert called by the appellees.

** Hereinafter, "Final Outline." The original, unrevised Final Outline dated April 23, 1971 was admitted into evidence as RX-DDD (A 2148-217). Subsequent to the close of the trial, the revised Final Outline was found and a copy was submitted to counsel for the appellees and the District Court. Thereafter, the appellees referred to this revised Final Outline in their post-trial memorandum (e.g., pp. 11-12, R. 126 (¶ 30) in Dkt. No. 77-2135), and the appellants requested the District Court to include the revised Final Outline in the trial record.

Unless otherwise noted, references herein will be to the revised Final Outline.

At the core of the planning and design of the MCC was the functional unit management concept, in which "all activities and services for detained persons will, whenever possible, be provided directly in the unit where these persons are billeted" (Tentative Outline, RX-CCC, A 2098; Final Outline, A 2224). As Mr. Mote testified, the Bureau planning team "did not initially think of using a functional unit approach" for the MCC (Mote Direct, A 1649). It was, however, subsequently raised within the team and, after "considerable discussion and debate" (*id.*), adopted for use at the MCC. In the Bureau's view, aside from the general advantages of staff working with relatively small groups of inmates and thereby fostering closer interpersonal relationships and better communication (*id.*), the functional unit concept

had particular application for a detention center because of the need to provide for a certain separation of pre-sentenced inmates from sentenced inmates, youths from adults, women from men, and so on, (*Id.* A 1650).

See Tentative Outline, RX-CCC, A 2099-100; Final Outline, A 2224-27; opinion, A 2695.

The innovative nature of the MCC design, and in particular of the functional unit concept, was described in some detail by Paul Silver who was the principal Gruzen architect working on the project with substantial experience in the field of correctional architecture.* According to Mr. Silver, in a conventional facility, including "any of the jails in the City of New York . . . , an inordinate number of officers are committed to traffic management, and have no [interface] with inmate population" (*Id.*, A 2423-24). As a result, although traditional

* Silver Dep., RX-YYY, A 2412-14, 2459.

facilities may have "the appearance of a great deal of space and a great deal of options and variety of things to do they don't" (*Id.*, A 2452-53).

In Mr. Silver's view, the functional unit concept was a sensible alternative to the "illusory freedom" of the traditional detention facility. In the MCC design, the functional unit "provided for a broad range of things to be done in the unit" thereby reducing inmate movement within the institution and staff time spent in directing traffic; with that was a concomitant increase in staff time "in contact with inmates" (*Id.*, A 2422; *see id.*, A 2439-40). Moreover, this self-contained unit, or "mini-institution" (*id.*, A 2448), was

an attempt to say that by making the unit smaller and making it more residential in scale you are giving the inmate a great variety of things to do, a great degree of options to do, choices which he can make himself which takes the staff out of the decision making process (*Id.*, A 2453; *see id.*, A 2460).*

* In assessing the objectivity and value of Mr. Silver's conclusions, it is important to note that he does not have a self-interest in defending the functional unit or modular concept since that concept was developed by the Bureau of Prisons and was part of the Bureau's mandate to the architects (*Id.*, A 2448-49; Mote Direct, A 1649-50). Moreover, as clearly demonstrated by Mr. Silver's later criticisms of his design of the Leesburg Prison (Silver Dep., RX-YYY, A 2454-59), he has been able to maintain a remarkable measure of professional objectivity in assessing his own work.

In contrast to this perspective, appellees offered only the views of an architect who has had only little practical experience in the field of architecture (Conway Dep., PX-167, A 1961-62), and no practical experience in the field of correctional architecture (*Id.*). Indeed, Mr. Conway testified that in his view neither he nor "any other architect [has] adequate enough knowledge to design a jail" (*Id.*, A 1958) and further that he would not accept a commission to design a jail because of ethical objections (*Id.*, A 1957-59).

Even William Nagel, appellees' correctional expert, recognized the significant break with the unhappy history of correctional facilities in the United States that the MCC design effectuated. For instance, as he acknowledged on cross-examination (A 717-18), Mr. Nagel was referring to the MCC design when he wrote in his book, *The New Red Barn, A Critical Look at Modern American Prisons*, 29-30 (1973), that:

There are some people who are aware of the impact of the cages now being built to hold innocent pre-trial detainees. They are seeking to design facilities which are much less dehumanizing and allow for face-to-face inmate-staff relations. One of the centers being designed, though it is secure, houses detainees in small groups and in individual cells where some privacy is afforded. Ample space is provided for inmate activities and these spaces are organized to allow for maximum used by inmates (*See id.*, A 719-21).

Mr. Nagel further conceded that the MCC design goes beyond the singular purpose of security and is an attempt to save and maintain human values (*Id.*, A 1096-97).*

Indeed, the District Court also concluded that the Bureau "stroved to be humane" in designing the MCC, and that it "undertook to plan not merely for security and efficiency, but for modest amenities that might rescue from the wretchedness of incarceration some remnants of privacy, self-respect, and, even, dignity" (opinion, A 2694). The photographic slides of typical housing units

* This testimony on cross-examination renders worthless Mr. Nagel's early testimony on direct examination that he was an early critic of the functional unit design embodied in the MCC and that the MCC was simply a reaffirmation of an obsolete pattern in correctional planning and architecture (*Id.*, A 697-701).

at the MCC (R. 14 in Dkt. No. 77-2035 and RX-UUU in Dkt. No. 77-2135) most dramatically confirm this.

B. Length of Stay

In deciding upon the functional or modular unit concept for use at the MCC, the Bureau anticipated that most inmates would be at the MCC for very short periods of time, and that a segment of the inmate population would nonetheless have more extended stays. For instance, length of stay studies included in the Tentative Outline showed that most inmates would be incarcerated at the MCC for 60 days or less, although a portion of the inmate population would remain beyond that point (Tentative Outline, RX-CCC, A 2141; *see id.*, A 2122). The appellants' length of stay statistics admitted into evidence demonstrate the accuracy of those predictions: the mean length of incarceration for all inmates is 51.21 days and the median is 16.35 days; furthermore, 42.40% of all inmates at the MCC are incarcerated for 10 days or less, 55.38% for 20 days or less, 62.68% for 30 days or less, 73.53% for 60 days or less and 81.01% for 90 days or less (Haimes Affidavit, Exh. C, A 2479-83).^{*} In short, it can fairly be said that in its two years of operation, the MCC has functioned as it was intended—a short

^{*} Although appellees presented their own statistical study and disputed the appellants' proof, we believe that appellants' survey is more reliable and more accurately describes the length-of-stay situation at the MCC. Appellants' study was prepared by a doctoral candidate with a Master of Arts degree in psychology and extensive training in statistics (Haimes Direct, A 1568-69). Further, Mr. Haimes fully explained the propriety of the methodology used by the appellants (*Id.*, A 1570-71, 1726, Haimes Cross, A 1575-77) and pointed out the serious deficiencies in appellees study (Haimes Affidavit, ¶ 7, A 2470-71). Moreover, the District Court appears to have accepted the appellants' data rather than that proffered by the appellees (opinion, A 2714 and n.16).

term detention center serving the federal courts in the New York metropolitan area.

C. Capacity

One of the problems the Bureau had faced at West Street was overcrowding (1965 Hearings, RX-000, A 2371). To remedy this problem the Bureau's plan for the MCC included a substantial increase in capacity: whereas West Street was housing approximately 285-300 inmates (1970 Hearings, RX-QQQ, A 2376; Tentative Outline, RX-CCC, A 2122) the plans for the MCC initially increased capacity by approximately one third to 405 individuals (1970 Hearings, RX-QQQ, A 2376-77; Final Outline, A 2254-64). By the time the MCC moved into the final construction phase, the Bureau had further revised the plans and expanded its capacity so that at the time the MCC opened in August, 1975 its planned capacity was for 449 individuals (opinion, A 2735).

In 1975, just prior to the time the MCC opened, the Bureau began to experience a rapid, and indeed, unprecedented rise in the number of individuals being committed to its custody by the courts. Norman Carlson, Director of the Bureau, testified at trial that during the prior period from approximately 1970 to 1975, the Bureau's inmate population had been growing at a "relatively slow rate, flat rate of growth" (Carlson Direct, A 1672). But, commencing in 1975, the growth rate "has been unprecedented" (*id.*, A 1671) leading to the present situation in which at the time of trial the Bureau population was 29,050 while the rated capacity of all Bureau facilities is approximately 22,500, with the overcrowding being most acute in the northeast (*Id.*, A 1669-70).

In response to this rapidly developing trend, in 1975, the Bureau undertook a number of steps generally to relieve the problem (*Id.*, A 1672-73). At the MCC,

which was shortly scheduled to open, the Bureau made certain operational changes to supplement the already increased capacity of that institution. The Bureau decided, first, that immigration cases would not be housed at the MCC as originally intended (Mote Direct, A 1657); and, second, that the community treatment center (*i.e.*, a halfway house) would not be put in the MCC (*id.*), but rather, additional space would be leased in New York City for such a facility (Carlson Cross, A 1688-89). These changes thus freed more of the MCC's facilities for housing those individuals constantly being committed to its custody by the courts—"pre-trial detainees and short termed sentenced detainees [and] those people serving writs" (Mote Direct, A 1657).

Despite these efforts, within a few months after the MCC opened in August 1975, the inmate population began to rise beyond MCC's rated capacity of 449. In order to provide housing for this rising population, the MCC began to replace the single beds with bunkbeds (or "double bunks") in some of the residential rooms,* and

*Contrary to the Court's statement in the opinion (A 2735), the MCC did not begin to place bunkbeds in some residential rooms "[e]ven before it [MCC] opened" in August, 1975. Rather, the MCC began to install bunkbeds in some residential rooms in late November, 1975 (Taylor Affidavit, ¶ 2, A124). Further, the maximum number of residential rooms in which bunkbeds had been installed was 73 (*id.*, ¶¶ 2-4, A 124-26) and not 121 as the District Court stated in its summary judgment opinion, 428 F. Supp. 333, 336. The distribution of these double bunks within the housing units at MCC was as follows:

Unit	Rooms Double- Bunked	Rooms Single Bunk	Total No. of Rooms	Type of Unit
Honor Unit	14	7	21	Cadre
3	24		24	Protective Custody
7-North	11	37	48	Pretrial
9-North	24	24	48	Pretrial

Taylor Affidavit, ¶¶ 2-3, A 124-25; Government's 9(g) Statement, 1 and 5, A 51-80 and 82.

also doubled the capacity of the dormitory (to 120 beds) by installing bunkbeds there (Taylor Direct, A 1184-85).

In conjunction with increasing the MCC's capacity by installing bunkbeds, the MCC initiated a series of steps in an attempt to reduce its population. Since approximately May 1976, the Bureau of Prisons has assigned a bus to the MCC which makes two scheduled trips from MCC each week in order to hasten the transfer from the MCC of individuals whose cases in the local federal courts have concluded; in addition, the MCC has been given authority to make special bus trips when such are needed to reduce its population (Taylor Direct, A 1187-89; Stip. of Facts, ¶ XXII-3, A 2560; Scher Direct, A 1482).^{*} The Bureau of Prisons' bus used in transporting individuals between Bureau correctional institutions was also diverted and rerouted so that now it comes to MCC only once per month, rather than 3 or 4 times per month, thereby reducing the instances when MCC would be required to provide housing for such in-transit holdovers (Taylor Direct, A 1187-88; see Exhibit XXII-3 to the Stip. of Facts, A 2685).

Further, MCC has undertaken greater efforts to coordinate prisoner movement with the U. S. Marshal Service, and reorganized the Receiving and Discharge Section at the MCC to maximize the speed with which inmates are transferred from the MCC after sentencing by the courts and designation to a long-term institution (Taylor Direct, A 1188; Scher Direct, A 1483-85; Stip. of Facts, ¶¶ XXII-1 and XXII-2, A 2560). In addition, the MCC expanded the facilities at its half-way house from 145 spaces to 160 and has contracted with other private half-way houses for additional bedspace; by doing this, and

^{*} Special bus runs, for the three months prior to trial, were averaging 3 to 5 per month (*Id.*; See Taylor Direct, A 1189).

with the permission of the judges in the Southern and Eastern Districts of New York, the MCC has been able to transfer some weekenders, *i.e.*, sentenced individuals serving their sentences on weekends, to half-way houses in order to help control the MCC's population (Taylor Direct, A 1188).

In January, 1977, the District Court prohibited the MCC from housing more than one individual in any of the residential rooms at MCC after March 19, 1977, thereby reducing its capacity by 73 bedspaces (A 3065). In order to achieve compliance with that order, and at the same time continue to fulfill its mission of housing individuals who are presently engaged in the local federal courts, the MCC drastically reduced its permanent work cadre—convicted inmates who were serving their sentences at the MCC—from approximately 103 individuals to 21 sentenced males as supplemented by a small number of females (Taylor Direct, A 1189-91, 1229; Taylor Affidavit dated October 31, 1977, ¶ 5 submitted to this Court on the appellants' motion for a stay). Since that reduction, the permanent cadre has consisted of only those inmates holding "key" or "lead" jobs, with the balance of the other jobs being filled by the more transient pretrial detainees and writ cases (Taylor Direct, A 1189-91, 1229). Although reducing the permanent cadre in this fashion has made the operation of the MCC more difficult,* the MCC concluded that this cutback nonetheless had to be made

* There can be little doubt that the MCC, as does any correctional institution, needs a core group of inmates who will remain at the institution for a substantial period of time to give the inmate work force some degree of stability, continuity and consistency in quality of work performed (Taylor Direct, A 1190-91; Nagel Cross, A 1092). The problems associated with a transient population are compounded in the case of pretrial detainees who can simply refuse to work or quit a job after assignment (Wright Cross and Redirect, A 1558, 1566-67; Taylor Direct, A 1229-30).

since a reduction in population was required by the Court's order and the only way to achieve it without interfering with pending cases in the local federal courts was through a reduction in this group which did not have current, ongoing involvement with the courts.

In addition, in order to reduce the population in the special Protective Custody Unit (Unit 3) to its single-bunked capacity of 24, the MCC also transferred several inmates housed there to other institutions (Taylor Affidavit dated March 1, 1977, ¶¶ 2 and 6, A 2991-92; *see* letter to the District Court from an inmate in that unit dated January 11, 1977, A 3023-25).

By its judgment dated October 13, 1977, the District Court has mandated that the MCC again drastically reduce its capacity and has prohibited it from exceeding its rated capacity of 449: it has ordered that the dormitory be reduced from 120 bedspaces to 60, and that the MCC end its practice of temporarily housing inmates in common areas until a room becomes available (judgment, ¶¶ 7-9, A 2890). Because of usual vacancies in the hospital unit and the women's unit, and the need to maintain a few vacancies for rapid influxes of new admissions and in the administrative detention and disciplinary segregation units, the practical effect of the judgment is to mandate an operating capacity for the MCC of approximately 400—well below even the rated capacity of 449—at a time when the number of individuals housed at the MCC because of their current ongoing involvement in the local federal courts has remained at approximately 500 or more (*see* MCC Daily Population Log Summary incorporated by reference into the Stip. of Facts, ¶ XXII-4, A 2560; Taylor Affidavit dated October 31, 1977, ¶ 6, submitted to this Court in support of appellants' motion for a stay).

As set forth more fully below, the appellants believe that the District Court's orders on capacity—its prior

prohibition on double-bunking which reduced the capacity of the MCC by 73 spaces, the ordered reduction of capacity in the dormitory by an additional 60 spaces and the elimination of temporary housing in commons areas—seriously jeopardizes the ability of the MCC and the Bureau to properly serve the criminal justice system in the three local judicial districts in a timely and secure fashion. The appellants believe that a proper, and ultimately constitutional, solution to this urgent problem lies in some accommodation between the realities of the present swollen prison population and the ideal conditions which the Bureau sought to embody in the MCC when its capacity was rated at 449. The District Court's orders have foreclosed any such accommodation, and for that reason, we believe, they are inconsistent with the facts here and beyond the requirements of the Constitution.

A R G U M E N T

Summary of Argument

Fundamental to the sweeping nature of the District Court's judgment and orders in this case is the legal standard that the District Court applied and its novel assertion of broad and general jurisdiction under the APA (5 U.S.C. §§ 701-06) and the Bureau's enabling statutes (18 U.S.C. §§ 4001, 4002, 4042, 4081, 4082) to review the conditions, policies and practices at the MCC. Appellants submit that the legal standard used by the District Court and its assertion of statutory jurisdiction are incorrect.

The case law that has developed in the field of prisoner's rights, and upon which the District Court relied in this case, was a response to what the District Court characterized as the "bestial traditions of the American jail" (opinion, A 2694 and n.2). Faced with such conditions, the courts have used rather forceful language,

announcing the applicable standards of law to remedy those conditions in sweeping language that frequently went far beyond the facts of the cases before them. Examples of this tendency can be found in the announced standard that in providing for the confinement of pretrial detainees, "any deprivation or restriction of the detainees' rights beyond those which are necessary for confinement alone must be justified by a compelling necessity" *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975),* or that "the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty" *Rhem v. Malcolm*, 507 F. 2d 333, 337 (2d Cir. 1974) quoting from *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark, 1971).

As noted in its opinions, the District Court looked to these general standards in deciding the issues raised in this case (opinion A 2706, 2773; 428 F. Supp. at 337; 406 F. Supp. at 1247). That, we submit, was error. First, the conditions at the MCC are fundamentally different from the conditions facing the courts in those prior cases, rendering the broad language used in those cases inapplicable here. Second, notwithstanding such broad language, the courts, including this Court, have not actually applied such standards in judging conditions of confinement. Rather, the standard has actually been, in the case of pretrial detainees, whether the conditions conform to accepted standards of decency and comfort as mandated by basic concepts of due process and equal protection guaranteed by the Fifth and Fourteenth Amendments of the Constitution. In addition, the standard for convicted inmates, finding its origin in the Eighth Amendment, is whether the conditions conform to "civilized standards of human decency." *Wright v. Mc-Mann*, 387 F.2d 519, 528 (2d Cir. 1967).

* Hereinafter, "Detainees".

When the facts of this case are viewed through the prism of a proper constitutional analysis and it is recognized that "courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners" *Cruz v. Beto*, 405 U.S. 319, 321 (1972), the District Court's orders here can not stand.

POINT I

The District Court Has No Statutory Jurisdiction And Applied The Wrong Constitutional Standard

A. The District Court's Assertion of Statutory Jurisdiction Was In Error

The District Court's assertion of statutory jurisdiction was premised on the notion that since inmates in federal custody were "its own" (opinion, A 2699) it had greater powers of review and jurisdiction over the Bureau and the MCC than a federal court reviewing the conditions of confinement in a state institution (opinion, A 2698-705).^{*} With due respect, "[t]he District Court,

^{*} See the District Court's observation in its summary judgment opinion that "it is perhaps permissible to note that the standards we have applied to the states under the Federal Constitution must surely be the barest minimum we can allow for our prisons. In dealing with the latter, our powers (and duties) of supervision may well require more than that minimum. Pressing this notion in concrete terms, petitioners have invoked the Administrative Procedure Act and the specific federal statute defining the obligations of the Bureau of Prisons to 'provide suitable quarters' and care, not less than discipline, for federal prisoners, 18 U.S.C. § 4042. These may well loom larger as the case progresses. And it may not be wholly irrelevant that the MCC, connected by a third-floor passageway to this building, is a place to which we federal judges consign people who are unable to meet bail conditions that we set." 428 F. Supp. at 340.

we believe, got off on the wrong foot in this case. . .” *Jones v. N.C. Prisoners’ Labor Union, Inc.*, — U.S. —, 97 S. Ct. 2532, 2538 (1977).

This Court in *United States v. Huss*, 520 F.2d 598, 602 (2d Cir. 1975) made clear that “the statutory scheme which forms the basis of federal sentencing and confinement authority permits a trial judge no [inherent] power [to control the place and conditions of confinement].” See *McNeal v. Taylor*, 313 F. Supp. 200, 202 (W.D. Okla. 1970); *Kahane v. Carlson*, 527 F.2d 492, 496 (2d Cir. 1975); *United States v. Marchese*, 341 F.2d 872, 789 (9th Cir. 1965). Moreover, although the Supreme Court noted in *Procunier v. Martinez*, 416 U.S. 396, 405 (1974),—which was cited by the District Court here (opinion, A 2699)—that “federal courts have a further reason for deference” when state institutions are involved, the Supreme Court concluded that judicial restraint in prison affairs “*more fundamentally . . .* springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention.” *Procunier v. Martinez*, *supra*, at 404 (emphasis added).

Correctly understood, this policy of judicial restraint means that “[c]ourts are accordingly limited in this area to deprivations which represent constitutional abuses and they cannot prohibit a given condition or treatment in prison unless it reaches the level of an unconstitutional deprivation.” *Sweet v. South Carolina Dept. of Corrections*, 529 F.2d 854, 859 (4th Cir. 1975) (*en banc*). See *Procunier v. Martinez*, *supra*, 416 U.S. at 405; *Newman v. State of Alabama*, 559 F.2d 283, 286-87 (5th Cir. 1977). See also *Breiden v. Jackson*, 457 F.2d 578, 580 (4th Cir. 1972); *Bethea v. Crouse*, 417 F.2d 504, 506 (10th Cir. 1969); *Edwards v. Duncan*, 355 F.2d 993 (4th Cir. 1966); *Daigle v. Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975); *Holt v. Sarver*, 309 F. Supp. 362, 369 (E.D. Ark. 1970), *aff’d*, 442 F.2d 304 (8th Cir. 1971). Neither the APA nor the Bureau’s enabling statutes, cited by the

District Court to support its asserted statutory jurisdiction, justify abandoning that policy.

As implicitly recognized by the District Court, there are no cases which hold that the APA provides a source of judicial review of the practices or conditions of confinement of federal prisoners. The only cases which even consider the applicability of the APA to the context of federal prisons deal with its procedural requirements for adjudicatory hearings and rule-making. In *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976), the Court held that prison disciplinary proceedings need not comply with the provisions of 5 U.S.C. §§ 554-57, while in *Ramer v. Saxbe*, 552 F.2d 695 (D.C. Cir. 1975) the Court held that the Bureau of Prisons was subject to the rule-making provisions of §§ 552-53. Neither decision is directly relevant to the issue of whether prison conditions are subject to judicial review under §§ 701-06, although certain of the considerations underlying the *Clardy* decision apply to this question.

Moreover, by its own terms, the APA exempts from judicial review "agency action [which] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The exemption applies to two circumstances both of which are present in prisoners' rights cases such as this one. First, judicial review is not available where the challenged actions involved matters of particular expertise which are best left to the agency's discretion. See *Kletscka v. Driver*, 411 F.2d 436, 443 (2d Cir. 1969). These are precisely the same factors which the courts have cited in favor of judicial restraint in the area of prison administration. See *Procunier v. Martinez*, *supra*, 416 U.S. at 404-05. A similar consideration was relied on by the Court in *Clardy v. Levi*, *supra*, 545 F.2d at 1246, for not subjecting prison disciplinary proceedings to all of the procedural requirements of the APA.

Second, judicial review will not be undertaken where there are no standards contained in the statute under which the challenged action was taken to permit the courts to evaluate the official's exercise of discretion. See *Greater New York Hospital Ass'n v. Mathews*, 536 F.2d 494, 497-98 (2d Cir. 1976); *East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F.2d 524, 528, 533 (9th Cir. 1972). Here, the enabling statutes do not provide the Court with any meaningful indicia with which to review the conditions and practices at the MCC.

The Sixth Circuit in *Walker v. Hughes*, 558 F.2d 1247 (6th Cir. 1977) has recognized this and has rejected the notion, accepted by the District Court here, that the Bureau's enabling statutes invest the federal courts with jurisdiction to review the conditions of an inmate's confinement:

Federal statutory law gives federal prison officials full discretion in the treatment of prisoners and does not restrict the authority of prison officials over the inmates as to placement in more restrictive living status, transfer to other prisons, subjection to significant and adverse effects on parole dates, and deprivation of privileges. Under 18 U.S.C. § 4042, the Bureau of Prisons is invested with the responsibility of management and regulation of the federal prison system. Under 18 U.S.C. § 4082(b), the Attorney General has the authority to transfer a prisoner from one penal institution to another at any time.

There is no question but that Congress can create property or liberty interests protected by the Due Process Clause, *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), and Congress has granted discretionary authority to prison officials. There is no Congressional provision for interpretive regulations that might re-

strict the discretionary authority of prison officials and create due process interests for the inmates in accordance with the legislative intent.

Case law requires the conclusion that, standing alone, the relevant federal statutory provisions, because they grant discretionary authority to prison officials, do not themselves create any liberty interests. . . .

558 F.2d at 1252-53 (footnotes omitted).

Indeed, the Court's analysis in *Walker* confirms what is well-recognized in the cases that the Bureau's enabling statutes do not create a private cause of action either for damages or for injunctive relief. *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969); *Johnson v. Lark*, 365 F. Supp. 289, 300-01 (E.D. Mo. 1973); *Brown v. United States*, 342 F. Supp. 987, 992 (E.D. Ark. 1972). On the contrary, the courts have construed § 4042 of the enabling statutes as vesting in the Attorney General wide discretion which will be reviewed only in case of exceptional circumstances or involving the denial of some federal right. *Mordan v. Ciccone*, 335 F. Supp. 920, 921 (W.D. Mo. 1971); *Tijerina v. Ciccone*, 324 F. Supp. 1265, 1267 (W.D. Mo. 1971); *Black v. Ciccone*, 324 F. Supp. 129, 132 (W.D. Mo. 1970). There is certainly no indication that in passing the predecessors to the Bureau's present enabling statutes Congress intended to create a private cause of action thereunder; indeed, the meager available legislative history suggests the contrary.*

* The legislative history of the predecessor statutes indicates that the Congress sought to centralize the authority to control and operate the federal prison system in the Bureau.

Present statutes are ambiguous as to who should designate the place of confinement of Federal prisoners. It is not clear from sections 5540, 5541, 5542 and 5546 of the

[Footnote continued on following page]

In recognizing the limitations of these statutes, the courts have not, however, left federal inmates without any meaningful method to redress alleged injuries arising out of their conditions of confinement. Injunctive relief to remedy seriously deficient conditions which might cause injury or loss of rights to inmates is clearly available under 28 U.S.C. §§ 2241 *et seq* which Judge Friendly of this Court has noted is "a wholly adequate remedy for federal prisoners". *Kahane v. Carlson*, *supra*, 527 F.2d at 498 (concurring). Likewise, in appropriate cases, District Court jurisdiction may be available under 28 U.S.C. § 1361. In addition, claims for monetary damages arising out of conditions of confinement may be brought against the United States under the Federal Tort Claims Act and against responsible officers either at common law or under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). There is, therefore, no reason to imply an additional cause of action under the Bureau's enabling statutes. *Cf. Piper v. Chris-Craft*

Revised Statutes (enacted before any Federal penitentiaries were established) whether the court may determine the place of confinement, or under what circumstances the Attorney General has the power to designate the place of confinement of Federal prisoners. Moreover, existing statutes, if strictly construed, would limit the power of the Attorney General to change the place of confinement of a Federal prisoner to those cases where the transfer is necessary to preserve the health of the prisoner or to remove him from an insecure institution or to prevent cruel and improper treatment. Section 7 gives statutory recognition to the existing practice by authorizing the Attorney General to designate or change the place of confinement of all prisoners. Proper administration and regulation of our penal institutions makes it necessary for some central coordinating agency to exercise this power.

H.R. Rep. No. 106, 71st Cong., 2d Sess. 3 (1930); *accord*, S. Rep. No. 533, 71st Cong., 2d Sess. 3 (1930).

Industries, Inc., 429 U.S. 1 (1977); *Black v. Beame*, 550 F.2d 815, 818 (2d Cir. 1977).*

As will be demonstrated below, the District Court's assertion of statutory jurisdiction has involved it in day-to-day practices and policies of the MCC ranging from uniforms for inmates to unlocking bathroom doors in visiting rooms—without a finding that any constitutional right has been violated. Such involvement, we submit, is unwarranted and violates the well-recognized principle that "courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners." *Cruz v. Beto*, *supra*, 405 U.S. at 321. See also *Newman v. State of Alabama*, *supra*.

B. The District Court Applied An Erroneous Constitutional Standard

While confinement in a detention or penal institution does not strip an inmate of all constitutional protection, *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2538, quoting from *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, in passing upon constitutional challenges to conditions of confinement and fashioning remedies for violations, the courts must act with restraint. As the Supreme Court noted in *Procunier v. Martinez*, *supra*, 416 U.S. at 404-05:

* The District Court's citation to *J. I. Case v. Borak*, 377 U.S. 426 (1964) is misplaced. In that case, it was clear that the plaintiffs had a private cause of action, and concomitantly that the District Court had jurisdiction, under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa. *J. I. Case v. Borak*, *supra*, at 430-31. The only question facing the Supreme Court was what remedies were available to the plaintiffs. *Id.*, at 433.

[The problems of prisons in America] require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

See also *Nadeau v. Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977); *Newman v. State of Alabama*, *supra*, 559 F.2d at 286-87; *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 200 (8th Cir. 1974).

Because of this lack of judicial expertise "prison officials must be accorded latitude in the administration of prison affairs," *Cruz v. Beto*, *supra*, 405 U.S. at 321; *Frazier v. Ciccone*, 506 F.2d 1022, 1024 (8th Cir. 1974), and courts should "ordinarily defer to their expert judgment" in matters of prison administration. *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S.Ct. at 2539. See *Gardner v. Joyce*, 482 F.2d 293, 295 (5th Cir.), *cert. denied*, 414 U.S. 1096 (1973); *Ross v. Blackledge*, 477 F.2d 616, 618 (4th Cir. 1973); *Burke v. Levi*, 391 F. Supp. 186, 189 (E.D. Va.), *vacated and remanded*, 530 F.2d 960 (4th Cir. 1975). It is true, of course, that the protection of fundamental constitutional rights necessarily involves an intrusion, and sometimes a considerable intrusion, into the administration of jails and prisons. *Procunier v. Martinez*, *supra*, 416 U.S. at 405-06. However, the doctrine of judicial restraint requires that courts refrain from engaging in what is essentially policy decisions in determining the extent of such rights. As the Court stated in *Holt v. Sarver*, *supra*, 309 F. Supp. at 369:

The Court, however, is limited in its inquiry to the question of whether or not the constitutional

rights of inmates are being invaded and with whether the Penitentiary itself is unconstitutional. The Court is not judicially concerned with questions which in the last analysis are addressed to the legislative and administrative judgment. A practice that may be bad from the standpoint of penology may not necessarily be forbidden by the Constitution. And a prison system that would be excellent from the point of view of a modern prison administrator may not be required by the provisions of the Constitution with which this Court is concerned.

See also *Nadeau v. Helgemoe*, *supra*, 561 F.2d at 413-17; *Newman v. State of Alabama*, *supra*, 559 F.2d at 287; *Sweet v. South Carolina Dept. of Corrections*, *supra*, 529 F.2d at 859; *Daigle v. Hall*, *supra*, 387 F. Supp. at 658; Note, "Decency and Fairness: An Emerging Judicial Role in Prison Reform," 72 Va. L. Rev. 841, 843 (1971).

That this doctrine of judicial restraint applies to cases involving pretrial detainees can not be doubted. As the Court observed in *O'Bryan v. County of Saginaw, Mich.*, 437 F. Supp. 582, 594 (E.D. Mich. 1977), a case involving conditions at a pretrial detention facility:

the Court does not attempt to determine what practices it would or would not implement if it were acting as an administrator. Instead, the search is for minimal standards below which prison administrators may not act.

In resolving these conflicting demands, courts have not relied upon a single standard to determine the constitutionality of challenged actions in conditions in the context of jails or prisons. Rather, their approach has necessarily depended on the nature of the right asserted.

First, there are the cases where prisoners invoke the protection of specific constitutional guarantees which are applicable to all persons regardless of whether or not

they are incarcerated. Among these are cases involving freedom of speech, e.g., *Procunier v. Martinez*, *supra*; *Wilkinson v. Skinner*, 462 F.2d 570, 672-73 (2d Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Oswald v. Sostre*, 405 U.S. 978 (1972); freedom of religion, e.g., *Cocper v. Pate*, 378 U.S. 546 (1964) (*per curiam*); *Kahane v. Carlson*, *supra*, 527 F.2d 492; racial discrimination, e.g., *Washington v. Lee*, 390 U.S. 333 (1968) (*per curiam*); *Finney v. Arkansas Board of Correction*, *supra*, 505 F.2d at 209-10; and access to the courts and to counsel, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Huss*, 312 U.S. 546 (1941); *Goodwin v. Oswald*, 462 F.2d 1237, 1241-42 (2d Cir. 1972); *Sostre v. McGinnis*, *supra*, at 189, 200-02. This category of cases is characterized by the least departure from the constitutional standards applicable to non-prison settings. This is not to say that the courts do not take into account the necessary restrictions on the exercise of such rights imposed by the security and administrative needs of prisons nor that the constitutional standards applied are identical to those which would be applied to case not involving a prison setting. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S.Ct. at 2540-41; *Smith v. Shimp*, 562 F.2d 423 (7th Cir. 1977). However, once the courts find a significant interference with such fundamental rights, they tend to require a relatively strict standard of justification.

The second category of prisoners' rights cases concerns the safeguards of procedural due process appropriate in prison settings. As in non-prison cases, the courts are faced with the initial task of determining whether there has been any deprivation of "life, liberty, or property," so as to trigger the protection of the due process clause. In *Meachum v. Fano*, 427 U.S. 215 (1976) the Supreme Court held that a hearing was not required prior to a prisoner's transfer from one institution to another, even where the latter had worse conditions, noting that "to hold as we are urged to do that *any* substantial dep-

rivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Id.* at 225 (emphasis in original). Once it is determined that the protection of the due process clause is applicable in a particular situation, the courts must arrive at the procedures appropriate to a prison hearing on the basis of a "mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application." *Wolff v. McDonnell*, *supra*, 418 U.S. at 556.

The third area of prisoners' rights cases concerns those which do not involve specific constitutional guarantees of general application. These cases have all been based on either the prohibition of cruel and unusual punishment contained in the Eighth Amendment or a concept of substantive due process or equal protection derived from the Fifth and Fourteenth Amendments. This is the area where the distinction between sentenced inmates and pretrial detainees becomes critical, and where, we submit, the District Court erred.*

3/11/82

1. Pretrial Detainees

Quoting from this Court's opinion in *Detainees*, *supra*, the District Court stated that for pretrial detainees at

* The Attorney General has recently established a Federal Corrections Task Force in the Department of Justice. The Task Force is to present to the Attorney General recommendations for national corrections standards and a federal corrections policy regarding conditions of confinement for both sentenced prisoners and pretrial detainees. The Task Force's initial report is scheduled to be presented to the Attorney General on January 27, 1978.

This brief was written on an expedited schedule with only limited opportunity for consultation with the Solicitor General and the other affected divisions of the Department of Justice, i.e., the Criminal Division and the Civil Rights Division. To the extent feasible within the time constraints of this case, we will attempt to advise the Court in a supplemental filing should pertinent policy determinations be adopted in the Department of Justice in this area.

the MCC—a “central group” in this action—“any deprivation or restriction of * * * rights beyond those necessary for confinement alone, must be justified by a compelling necessity” (opinion, A 2706). See the District Court’s statement in its prior opinion on visiting hours (preliminary injunction) that for pretrial detainees “restrictions on access by visitors must be justified by ‘compelling necessity * * *’” and that the “‘doctrine of least necessary restraint requires, as a matter of due process, that visiting conditions be curbed only to the extent needed to assure institutional security and administrative manageability’” 406 F. Supp. at 1247. Such analysis, we submit, is in error and has led the District Court in this case to assume a broad power of review inconsistent with the well-established policy of judicial restraint in the area of prison administration.

In all of the prior cases which have employed the language of “compelling necessity” or “least restrictive means,” those standards were contained in *dicta*, for the challenged conditions were so shocking that under any less stringent standard, even that of cruel and unusual punishment, the courts would have reached the same results. Thus, for the most part, the courts have not considered whether the challenged conditions were justified by some standard of necessity, but rather whether they comport with contemporary standards of decency and comfort.

For instance, in *Rhem v. Malcolm*, 371 F. Supp. 594, 636 (S.D.N.Y.), *aff’d*, 507 F.2d 333 (2d Cir. 1974), one of the leading cases purportedly relying upon that standard, the District Court had concluded that the “dismal conditions” which were present at the Manhattan House of Detention (“MHD”)

would shock the conscience of any citizen who knew of them. The thousands of inmates who pass through its portals each year . . . are in some instances subjected to cruel punishment, although the Constitution forbids any punishment of de-

tainees, and are deprived of due process and equal protection of the laws. This state of affairs exists in spite of the humane efforts of the present Departmental administration to afford the "tolerable living conditions" to which prisoners are entitled by law (footnote omitted).

In affirming the District Court's decision to close MHD, this Court adopted the District Court's findings concerning the "dismal conditions" at MHD, 507 F.2d at 336, and indeed, went on to cite the conclusion of the New York City Board of Correction (manifesting obvious agreement with it) that despite improvements made at MHD subsequent to the District Court's initial opinion, it was a "fundamentally inhuman environment", 507 F.2d at 339, quoting from New York City Board of Correction, Report on the Future of the Manhattan House of Detention p. 27 (August 6, 1974).

Likewise the totality of circumstances in *Detainees*, *supra*, 520 F.2d at 398, drew such a stark picture that neither a "least restrictive means" nor "compelling necessity" analysis would have been required to affirm the District Court's findings of unconstitutional conditions:

What we are faced with here is whether double-celling in a 5 x 8 feet, 40 square feet of floor space, creates such dehumanizing conditions as to deprive the detainees of their constitutional rights of due process and equal protection. When a detainee is crammed into a 5 x 8 foot cell designed for single occupancy with another detainee for fourteen to sixteen hours per day for an average of sixteen weeks, he is forced to suffer numerous indignities, invasion of privacy and risk of harm to his person and property.

The conditions cases on which *Rhem* and *Detainees* rely, or which have followed them, have also presented the same deplorable totality of circumstances leaving lit-

tle room for doubt, or need for particularized analysis, that incarceration under such conditions offended contemporary standards of decency and comfort. For example, in *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 687 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974), the Court noted, after an extensive description of the physical condition at the jail: "For years, the consensus in the community, from commissions and experts making in-depth studies of the facility to passing citizens struck by its archaic and forbidding exterior, has been to condemn the use of the jail." Similarly, in *Jones v. Wittenberg*, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972), the District Court stated: "The plaintiffs offered expert testimony to show that the Lucas County Jail was outstandingly bad from every standpoint. This expert testimony was not contradicted, and is significant, since local jails appear from the literature to be none too good at best. The Lucas County Jail is a local jail at worst." 323 F. Supp. at 97-98. See also *O'Bryan v. County of Saginaw, Mich.*, *supra* 437 F. Supp. at 602 ("The total environmental picture of the Saginaw County Jail is sufficiently harsh to justify the conclusion that inmates confined there have been subject to cruel and unusual punishment and to a deprivation of due process. . . ."); *Ahrens v. Thomas*, 434 F. Supp. 873 (W.D. Mo. 1977); *Moore v. Janing*, 427 F. Supp. 567, 573 (D. Nev. 1976); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 120 (D.D.C. 1976) ("[T]he reality of conditions at the D.C. Jail is so bad as to compel the Court to hold that they constitute cruel and unusual punishment for any human beings incarcerated there . . ."); *Martinez Rodriguez v. Jiminez*, 409 F. Supp. 582 (D.P.R.), *stay denied*, 537 F.2d 1 (1976), *aff'd*, 551 F.2d 877 (1st Cir. 1977); *Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972) ("The shocking and debasing conditions which prevailed [at the jail] constituted cruel and unusual punishment for man or beast as a matter of

law. [T]he Court's inescapable conclusion was that Grey-stone should be razed to the ground."); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971); *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A. 2d 1110 (1971).

Moreover, even those decisions which deal with the necessity of the challenged conditions reveal a curious uncertainty as to whether the courts really mean that they must evaluate alternatives to the challenged practices or conditions or only that they are to consider whether such practices or conditions are reasonably necessary to ensure the detainee's appearance at trial and to protect the security of the institution. Some of these decisions speak only of necessity without employing least restrictive alternative language at all. See, e.g., *Inmates of Milwaukee County Jail v. Peterson*, 353 F. Supp. 1157, 1160 (E.D. Wis. 1973); *Collins v. Schoonfield*, 344 F. Supp. 257, 265 (D.Md. 1972); *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971). Others employ both standards as though they were interchangeable. See, e.g., *Rhem v. Malcolm*, *supra*, 507 F.2d at 336-37 and 371 F. Supp. at 623; *Moore v. Janing*, *supra*, 427 F. Supp. at 571; *Wilson v. Beame*, 380 F. Supp. 1232, 1237 (E.D. N.Y. 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, *supra*, 360 F. Supp. at 686. See also, Note, "Constitutional Limitations on the Conditions of Pretrial Detention", 79 Yale L.J. 941, 949-950 (1970).^{*} Even in those cases that adopt only the least restrictive alternative approach, there is a marked failure of any of the courts actually to consider alternatives.

This failure may be attributed in part to the fact that upon closer analysis, the least restrictive alternative test is not a very useful tool for the resolution of the

^{*} In this law review note, whose analysis is heavily relied on by all the cases involving pretrial detention centers, the appropriate standard is also referred to as whether the restrictions on detainees are "reasonably related" to the purpose of ensuring their presence at trial.

types of issues raised in cases challenging the conditions of incarceration of pretrial detainees. The resolution of many of those issues depends not on the need for the challenged condition to ensure security or appearance at trial, but rather on a determination of what are minimal acceptable levels. For example, in such areas as physical environment, food, hygiene, medical services, recreation, visiting hours, etc., the question is whether the institution is providing reasonable and decent conditions of confinement, not whether it is implementing the least restrictive alternative. In these areas, one can always do better: 150 square feet of living space per inmate instead of 75, steak instead of meatballs, ten inmates per shower instead of twenty, ten hours of medical visits per day instead of five, ten hours of recreation time per week instead of seven, six hours of visiting per day instead of three, etc. Nevertheless, in dealing with such problems, even those courts which purport to adopt the least restrictive alternative test invariably end up evaluating the decency rather than the necessity of the challenged conditions and ordering only reasonable improvements where they find sufficiently egregious conditions.

The most recent example of this "reasonableness" analysis can be found in *Rhem v. Malcolm*, 432 F. Supp. 769 (S.D.N.Y. 1977) (Lasker, D.J.) denying the City's application pursuant to Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure to modify the District Court's order of July 11, 1974 and permit the City to use MHD as a general detention facility. Although in its opening remarks the District Court made a general reference to the "compelling necessity" language as the standard by which to test the City's renovation plan, 432 F. Supp. at 772-73, it quickly shifted its analysis and stated that in resolving the specific disputed issues, the test would be whether the "plan will create an acceptable living environment." *Id.* at 775. In addition, in resolving the noise issue in favor of the City, the Court specifically

rejected the plaintiffs' argument that under the least restrictive means test, even greater efforts should be required to lower the noise, noting that it is "not the Court's function to require particular details of a scheme if the proposal as a whole will reduce noise to constitutionally acceptable levels." *Id.* at 777. In also rejecting plaintiffs' argument that under equal protection and "least restrictive means" tests the City's plan on noise failed because it did not provide individual earphones for inmates, the District Court further concluded that these tests look "to the cumulative effect of conditions of confinement and [do] not require exact equivalences in every detail of institutional life." *Id.*

Where overall conditions meet constitutional standards, and the particular condition or practice complained of is not health-threatening nor a direct restraint on liberty, a rational justification is all that is constitutionally required to support a minor difference in treatment. *Id.* at 777-78.

See also *Rhem v. Malcolm*, 389 F. Supp. 964, 971, motions to alter judgment, 396 F. Supp. 1195 (S.D.N.Y.), *aff'd*, 527 F.2d 1041 (2d Cir. 1975), where the Court, in approving a less liberal visiting schedule than that sought by plaintiffs, stated: "It must be remembered that we are here dealing with constitutional rights which set minimal, not maximum or 'desirable' standards. The constitutional norm ought to be a reasonable number of opportunities for visits of reasonable duration."

Even as to issues where an examination of alternatives to the challenged condition or practice may seem appropriate, it is questionable whether the courts are the proper institutions to undertake that type of analysis. Although adopted or suggested in a number of other areas,* the

* See Wormuth & Mirkin, "The Doctrine of the Reasonable Alternative," 9 Utah L. Rev. 254 (1964); Struve, "The Less-Restrictive-Alternative Principle and Economic Due Process", 80

[Footnote continued on following page]

least restrictive alternative test has its origins and firmest support in cases decided under the First Amendment. See, e.g., *United States v. Robel*, 389 U.S. 285, 268 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943). In reviewing this area, one commentator has concluded:

Since the Court lacks the competency to measure the relative efficiency, cost and repressive effect of alternative measures, consideration of less drastic means cannot provide any form or structure to this choice [between the conflicting values of the state's interest and First Amendment values]. The search for standards that will make the adjudicative process more explicable must go forward without the illusion that "less drastic means" gives the Court a useful tool in First Amendment cases.

Note, "Less Drastic Means and the First Amendment", 78 Yale L.J. 464, 474 (1969). Cf. *Procunier v. Martinez*, *supra*, 416 U.S. at 404-05.

The decisions reviewing conditions of incarceration for pretrial detainees have sought to obviate this difficulty by refusing to give any consideration to the cost or administrative burden of less restrictive alternatives. See, e.g., *Rhem v. Malcolm*, *supra*, 371 F. Supp. at 626, citing with approval *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) that "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." Appellants do not disagree with this principle as applied to such cases where the condition being challenged either "offends contemporary concepts of decency and human dignity and precepts

Harv. L. Rev. 1463 (1967); Note, "Developments in the Law—The National Security Interest and Civil Liberties", 85 Harv. L. Rev. 1130, 1297-1301 (1972); Note, "Developments in the Law—Civil Commitment of the Mentally Ill", 87 Harv. L. Rev. 1190, 1245-1252 (1974).

of civilization which we profess to possess", *Jackson v. Bishop, supra*, at 579, or "are so unnecessary as to be a denial of due process", *Rhem v. Malcolm, supra*, 507 F.2d at 338. However, it does not follow that cost and administrative burden may not be considered if the least restrictive alternative standard is to be elevated from *dictum* to the principle governing this case. As noted above, in many areas of prison life there is no limit to what would be "the least restrictive confinement" consonant with ensuring the security of the institution and the presence of detainees at trial except cost and administrative factors. To ignore them would produce absurd results,* rendering the cost and administrative burden of maintaining a detention facility so high as to accomplish indirectly the abolition of pretrial detention.

In sum, it is appellants' position that in reviewing practices of incarceration for pretrial detainees under the due process clause which involve deprivations of rights not specifically guaranteed by the Constitution, the standard is whether it is reasonably related to the goal of detention and the needs of the institution for security, order, health, and safety. This standard was adopted in *Padgett v. Stein*, 406 F. Supp. 287, 295 (M.D. Pa. 1975) where the Court held that "even if a sanction, restriction, or condition can be viewed as having a punitive effect on the pretrial detainee, it is constitutional if it also furthers the alternative governmental purpose of maintaining custody, maintaining security, or maintaining internal order and discipline within the institution." Moreover, with respect to those issues concerning the acceptable level of general living conditions, the standard must be that of con-

* Surely the least restrictive confinement would be to allow pretrial detainees to go home accompanied by a sufficient escort of United States Marshals to ensure their appearance at trial. Is there really any justification for not adopting that alternative other than the burden upon the Government?

temporary levels of comfort and decency, and to the extent that more than the minimal standard of the Eighth Amendment is required, consideration should be given to reasonable cost and administrative limitations. As the Court held in *Bethea v. Crouse*, *supra*, 417 F.2d at 506:

In balancing the necessity for a free hand in prison administration against the basic constitutional rights of prisoners, it seems practical and workable to say, as did the 4th Circuit in *Edwards v. Duncan*, 355 F.2d 993 (4th Cir. 1966), that "[t]he hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment."

2. Sentenced Inmates

In every case involving challenges by sentenced inmates to prison practices and conditions which did not infringe upon rights of general application specifically guaranteed under the Constitution, the only source of constitutional review was the Eighth Amendment's prohibition of cruel and unusual punishment. See, e.g., *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975); *Finney v. Arkansas Board of Correction*, *supra*, 505 F.2d at 207; *Sostre v. McGinnis*, *supra*, 442 F.2d at 190-94; *Jackson v. Bishop*, *supra*, 404 F.2d 571; *Wright v. McMann*, *supra*, 387 F.2d 519; *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971). The standard for judging prison conditions under the Eighth Amendment is whether they violate "civilized standards of human decency." *Wright v. McMann*, *supra*, at 528. See *Nadeau v. Helgemoe*, 561 F.2d 411 (1st Cir. 1977). Furthermore, in evaluating prison conditions under this standard, the courts may consider the length of time that an individual is subjected to the challenged conditions. *Sweet v. South Carolina Dept. of*

Corrections, supra, 529 F.2d at 865; *Johnson v. Anderson*, 370 F. Supp. 1373, 1387 (D. Del. 1974).

This Court, as well as others, has recognized that this standard under the Eighth Amendment is different than the constitutional standard for pretrial detainees, mandating different results according to whether the challenged condition of confinement affects convicted inmates or pretrial detainees. See, e.g., *Rhem v. Malcolm, supra*, 507 F.2d at 336 n.5 in which this Court stated that "[t]he constitutional theory is sufficiently different from that discussed here to justify not regarding [sentenced inmates] as part of the plaintiff class for purposes of this appeal." *Detainees, supra*, 520 F.2d at 399; *Inmates of Suffolk County Jail v. Eisenstadt, supra*, 360 F. Supp. at 690; *Miller v. Carson*, 401 F. Supp. 835, 899 (M.D. Fla. 1975).

The District Court failed we submit, to fully account for this difference. With only one exception,* the District Court simply refused to distinguish between convicted inmates and pretrial detainees when judging the constitutionality of the challenged conditions, and offered no particularized analysis for failing to do so. For example, with respect to the claim of overcrowding in the dormitory unit, the Court simply stated that "[t]he doubling of dormitory occupancy is held, in sum, to descend below the constitutional minimum, both for detainees and for sentenced prisoners . . ." (opinion, A 2740). Similarly, in support of its previous prohibition on double-bunking for all inmates at MCC, the District Court remarked in conclusory fashion that permitting double-bunking for sentenced inmates would render them an "inferior minority of persons" and would be "cruel and unusual". 428 F.

* The one exception concerned the MCC's practice regarding room searches (opinion, A 2773). As set forth below, appellants believe that this practice should have been found constitutionally acceptable for both pretrial detainees and convicted inmates.

Supp. at 339. The District Court reasoned that "it would be sad indeed to have a new and highly publicized federal facility [for pretrial detainees] promptly transformed, at least in part, into a penal slum for persons serving sentences." *Id.* As the cases make clear, there is, however, no constitutional infirmity in housing detainees and convicted inmates under different conditions in the same institution. *Inmates of Suffolk County Jail v. Eisenstadt*, *supra*, 360 F. Supp. at 690; *Miller v. Carson*, *supra*, 401 F. Supp. at 399; *See Detainees*, *supra*, 520 F.2d at 399. *But cf.*, *O'Bryan v. County of Saginaw, Mich.*, *supra*, 437 F. Supp. at 582.* In the final analysis, it must be remembered that, as the Supreme Court has stated in a different context, the Constitution "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, there is no justification for applying the legal standards applicable to pretrial detainees to sentenced inmates merely because they are incarcerated in the same building.

POINT II

This Court Has Broad Powers of Review Over The District Court's Decision In This Case

Before addressing the specific issues raised by this appeal, it is helpful and necessary to briefly reiterate this Court's scope of review over the District Court's decision.

This Court's powers of review in this case are not limited to the "clearly erroneous" standard of Rule 52(a)

* The use of a single standard in *O'Bryan* is fully explained on two grounds. First as noted above, p. 32, the District Court found the "total environmental picture" to be cruel and unusual punishment for inmates there, 437 F. Supp at 602, thus in violation of the well-recognized standard for even convicted inmates. Second, the District Court justified its single standard analysis on the ground that, unlike the situation here, the jail did not distinguish between pretrial detainees and convicted inmates and co-mingled them in their cell assignments (*Id.*, at 582).

of the Federal Rules of Civil Procedure. It can not be doubted that the District Court's conclusions concerning the alleged unconstitutionality, or arbitrary and capricious nature, of the challenged conditions in this case involve mixed questions of law and fact. As this Court recently stated in *First National Bank of Cincinnati v. Pepper*, 547 F.2d 708, 710 (2d Cir. 1976) in reversing a judgment after trial, a mixed question of law and fact is not protected by the clearly erroneous rule, and is "open to full review". See, e.g., *James Talcott, Inc. v. Wharton*, 543 F.2d 986, 995 (2d Cir. 1976); *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120 (7th Cir. 1976) (Clark, J.). Further, this Court has reasoned in *In Re Hygrade Envelope Corp.*, 366 F.2d 584, 588 (2d Cir. 1966) (Friendly, C.J.) that

[A]s we have recently noted, there are substantial reasons, particularly relating to consistency of decision, that dictate rather full review [when the identity of the fact-finder is a court rather than a jury or administrative agency]. *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 778 (2 Cir. 1966). To be sure, an appellate court must respect findings of the trial judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case, cf. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, 67 S.Ct. 752, 91 L.Ed. 849 (1947). But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are "clearly erroneous"; it is enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law (footnote omitted).

Broad review is also mandated here because the District Court's conclusions are ultimate facts which "are not

'provable' in the usual sense and are part and parcel of the constitutional judgment [the appellate court] must make." *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 349 (1st Cir. 1975). See *United States v. Weingarden*, 473 F.2d 454, 460 (6th Cir. 1973). Moreover, with very few exceptions, the District Court did not make findings of credibility, or base its conclusions on expert opinion, and hence this Court is in as good position as the District Court to judge the acceptability of the challenged conditions. See *Forts v. Ward*, Dkt. Nos. 77-2073, 77-2078, slip op. 575 (2d Cir., Nov. 30, 1977); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 3 F.2d 1090, 1093-94 (2d Cir. 1977); *Colorado Springs Nat'l Bank v. United States*, 505 F.2d 1185, 1189 (10th Cir. 1974); *United States v. Weingarden*, *supra*, 473 F.2d at 461.*

Lastly, although its opinion is quite lengthy, the District Court, in the main, did not make detailed and specific findings of facts, but rather in many critical instances merely set forth general conclusory statements, e.g., the conclusion that visitors are subjected to an unjustified "annoyance and indignity" since access to visiting room bathrooms is under the key control of an officer, (opinion, A 2751); that double-bunking is "cruel and unusual" for sentenced inmates, 428 F. Supp. at 339; or that with limited double-bunking, the commons areas take on "oppressive consequences" and "become unworkable for their intended uses", *Id.*, at 337. When a District Court fails to make detailed findings in support of its conclusions, this Court "must engage in a somewhat more searching review." *Kampeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977). See *State of New York v. Nuclear Regulatory Commission*, 550 F.2d 745, 752-53 (2d Cir. 1977).

* This is particularly true with regard to the District Court's summary judgment decision and the preliminary injunctions on visiting hours and telephones wherein no live testimony was taken.

POINT III

The District Court Erred In Ruling That Inmates May Be Incarcerated At MCC For A Maximum of 60 Consecutive Days Absent Their Consent

Citing only to *Rhem v. Malcolm*, *supra*, 432 F. Supp. 769, the District Court has concluded that housing inmates at the MCC for more than 60 consecutive days will "likely" cause inmates to suffer "unduly in terms of close, confining, tense, and frustrating confinement" (opinion, A 2715). This situation, the Court further concluded, "is an arbitrary and capricious deviation from the intended and promised use of the facility. It is, if the point need be reached, a denial of due process. There is no reasonable or rational basis for perverting a facility built and justified for brief periods of detention into a long-term prison" (*Id.*).

Neither the case law nor the record in this action supports the District Court's conclusions of "likely" or "actual" injury to *any* inmate at the MCC or that the MCC has been perverted into a long-term prison.

First, the *Rhem* case cited by the District Court is no support at all for the Court's order here. In that case, William Nagel, the plaintiffs' correctional expert, described in vivid detail the character of the housing units at MHD which the City was seeking to reopen after completing certain renovations:

"For the person who occupies the cell, you are within three solid pieces of steel with a cage front, an open grilled front beyond which there is another open grilled front, and beyond which, in some cases, I believe, there is a third open grilled front. So, as you are in your cell, the only vision you have of the world is three sets of grilles, cage-like grilles, then a wall, a wall that has opaque windows. The

light—you see the light, but you see no objects, so from your cell—the only object you see from your cell are grilles, bars, bars, bars, bars, that is all. That is the effect of an inside cell.”

Rhem v. Malcolm, supra, 432 F.Supp. at 786. See the photograph of a housing unit at MHD which is reproduced at 432 F. Supp. at 790. Since “[t]he housing design of a jail is the primary contributor to the detention experience” and the City’s proposed renovations would not significantly alter the character of those units, Mr. Nagel, and ultimately the Court in *Rhem*, concluded that MHD could not be reopened as a general purpose detention center. *Id.* at 787.

That physical environment—which may very well have adverse psychological effects on inmates housed there more than overnight—just does *not* compare to the physical environment at the MCC. As the District Court noted in its opinion, the Bureau “stroved to be humane” in designing the MCC and sought to introduce some measure of “privacy, self-respect, and, even, dignity” (opinion, A 2694). Indeed, the physical environment at the MCC is “markedly different from the familiar pattern of barred cages, gray corridors, and clanging gates” (*id.*) that is typified by the structure of MHD. The color slides of the housing units at MCC (RX-UUU and R.14 in Dkt. No. 77-2035) and the District Court’s description of a typical housing unit (opinion, A 2695-96) perhaps best demonstrate the radical departure from the traditional jail design that the MCC effected.

Given the fundamentally different physical characters of the MCC and MHD, the District Court’s comment in *Rhem* that MHD might well be suitable for “short term, limited use as a lock-up or holding area” but not for a longer period, 432 F. Supp. at 789, on its face, is of little, if any, usefulness in determining whether the MCC provides an acceptable environment for individuals housed there for more than 60 days.

Second, the District Court's generalized pronouncement that incarceration at the MCC for more than two months is unduly "close, constricting, tense and frustrating" (opinion, A 2715) is not supported by any objective evidence. As noted above, the primary determinant of institutional life within any detention or correctional facility is the housing unit to which inmates are assigned, and the housing units at the MCC provide inmates with an ample amount of living space, i.e., "space for sleeping and other private purposes—supplemented by day room or recreation space." *Ambrose v. Malcolm*, 414 F. Supp. 485, 489 (S.D.N.Y. 1976). Indeed, in the units with individual residential rooms each inmate is provided with at least 177 square feet of living space (Appendix A hereto). Compare, *Detainees, supra*, 520 F.2d at 394-95 wherein the District Court dismissed a claim that incarceration at the Brooklyn House of Detention was excessively and unconstitutionally confining; in that case each inmate (after the prohibition on double-celling) had 40 square feet of sleeping space, 15 square feet of corridor space, and a small inadequately equipped dayroom. Even in the dormitory unit at the MCC—the most crowded—inmates are provided with at least 68 square feet of living space which is only slightly less than the standard of 75 square feet recommended by the American Correctional Association and adopted by the Court in *Ambrose v. Malcolm, supra*, 414 F. Supp. at 489, a case involving pretrial detainees. Moreover, the MCC figure exceeds the constitutional minimum of 60 square feet set by Judge Johnson in *Pugh v. Locke*, 406 F. Supp. 318, 334 (D. Ala. 1976), *aff'd and remanded sub nom. Newman v. State of Alabama*, 559 F.2d 283 (5th Cir. 1977), or in *Gates v. Collier*, 407 F. Supp. 1117 (1975) and 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd and remanded*, 548 F.2d 1241 (5th Cir. 1977) ("... 50 square feet of living space

* Nagel Recross, A 1099; *Rhem v. Malcolm, supra*, 432 F. Supp. at 787.

per inmate is the minimal acceptable requirement to comport with the constitution.") Thus, as to this objective index—square footage of living space per inmate—which the Courts have come to rely upon as a useful predictor of whether an environment is "close" or "constricting" the MCC exceeds or at least substantially meets generally accepted standards.

Likewise, the lock-in practices at the MCC provide substantially more movement for inmates within the housing units than the practices at other large detention centers located in urban areas. In general, inmates are locked into their rooms for only approximately 7½ hours per day during the week, 5 hours per day on weekends and holidays, and for short periods during institutional counts (Stip. of Facts, ¶ II-1, A 2530-31).^{*} During the approximately 16½ to 19 hours a day that inmates are not locked into their rooms, they have free access to the multi-purpose room, the balcony education area, and the recreation room located in each unit; in these areas are various recreational and exercise equipment, telephones, televisions, book racks and other furnishings (Stip. of Facts, ¶ I-1, A 2495-2527; opinion, A 2696). Adjacent to the multi-purpose rooms are visiting rooms where each inmate is permitted three visits per week for up to 3½ hours per visit (Taylor Direct, A 1218-19). Regularly scheduled educational programs are conducted on the balcony educational area and some classes are held at a centralized location for all units (opinion, A 2728-29; Exh. VII-7(a), (b) and (c) to Stip. of Facts, A 2571-96; RX-AA, BB, and CC, A 2037-53). The visiting rooms, balcony areas, and recreation rooms are also used for religious services

^{*} As noted at trial (Taylor Cross, A 1263-64) the lock-in at mealtimes for the dormitory unit had been discontinued; in addition, a 30-minute morning clean-up lock-in on this unit was discontinued after about two weeks, although inmates are still required to remain in their dormitories for clean-up during that time (Rivera Affidavit, ¶¶ 4-7, A 2997).

(opinion, A 2718; Miller Direct,* A 877; Hemlock Direct,** A 1365). An opportunity for at least one hour of outdoor recreation is available on a daily basis for the inmates in every unit (opinion, A 2716; RX-CC and KKK, A 2053, 2307-54; David Direct,*** A 1724). And while there is no central auditorium, a variety of entertainment programs have also been provided to the inmates directly on the units (RX-LLL, A 2355-59).

The extremely limited time during which inmates are locked-in at the MCC and the diverse activities available to them on the units thus stand in stark contrast to the practices and facilities at other large urban detention centers which have come under attack as being unconstitutional. The difference is typified by the situation in *Detainees, supra*, where inmates were locked in 5 x 8 cells for 14 to 16 hours per day, and when allowed out of their cells into the immediate area of their housing units, only had access to inadequately equipped dayrooms and lock-out corridors.**** *Detainees, supra*, 520 F.2d at 395. See, e.g., *Ahrens v. Thomas, supra*, 434 F. Supp. at 895; *Inmates of Suffolk County Jail v. Eisenstadt, supra*, 360 F. Supp. at 683, 687; *Brenneman v. Madigan, supra*, 343 F. Supp. at 133.

Thus, again, confinement at the MCC, given the lock-in practices and available facilities and programs in the living units, can not fairly be considered unduly

* Glen Miller was an inmate at the MCC called by the appellees.

** Alfred Hemock was an inmate at the MCC called by the appellants.

*** Edna David is a recreation specialist employed at the MCC.

**** As the Court in *Rhem* indicated in the context of MHD, a lock-out corridor in the setting of a traditionally designed jail is "essentially a place to do 'dead time'". *Rhem v. Malcolm, supra*, 432 F. Supp. at 779.

"close" and "constricting" as those terms have come to be used in the relevant case law and by objective experts in the field of corrections. This point is perhaps best made by Dr. George Camp, a correctional expert called by the appellants who had previously been approached by the appellees to serve as their expert (Camp Direct, A 1383),* in responding to a comment by appellees' expert (William Nagel) that the MCC is the "most restrictive" jail in America:

It is like when people say that a prison is like a country club. In response to that I say they have either never been in a prison or they've never been in a country club, because there is no comparison. And I would use the same analogy as to this facility being the most restrictive (Camp Direct, A 1400).**

Moreover, in a memorandum issued subsequent to its main opinion (A 2825-26) the District Court has implicitly rejected its prior conclusion that confinement for more than 60 days at the MCC is unduly burdensome on in-

* The objectivity of Dr. Camp's views is further supported by the fact that he testified on behalf of inmate-petitioners in the case *Ahrens v. Thomas*, *supra*, 434 F. Supp. at 877, 884.

** See p. 10 above for a statement of Mr. Nagel's objective views concerning the MCC when not assuming a partisan posture in litigation against the MCC. See also Nagel Cross, A 1090-91, for his generally laudatory views of the MCC in the fall of 1975 when testifying on behalf of the plaintiffs in *Rhem v. Malcolm*.

The bias of appellees' other expert is also manifest. On the basis of no evidence at all, Dr. Frank Rundle, appellees' psychiatrist, opined that incarceration in a modular unit at the MCC for even one day has significant harmful psychological effects (Rundle Cross, A 788); the District Court obviously found Dr. Rundle's testimony of little help on this issue. Moreover, as the District Court indicated (A 1146), general conclusions by appellees' experts that the MCC is "maximum custody" or imposes "excessive confinement" (Alter Direct, A 1147; Fogel Direct, A 1110) are likewise useless (opinion, A 2708-09).

mates. By its Memorandum of September 29, 1977, denying appellees' motion to reargue the 60-day rule, the District Court indicated that in its view "the oppressive circumstances of confinement to the limits of the modular unit"—presumably, the same "close" and "constricting" confinement adverted to in its prior opinion—"would have relatively attenuated impact for the detainee awaiting trial and being tried, since the sojourn of such a person is frequently interrupted by trips to court and visits with attorneys" (*Id.*). Although not acknowledged by the District Court, this situation also prevails for the other, sentenced, inmates at the MCC who the District Court indicated were the intended beneficiaries of this 60-day rule: After all, sentenced inmates at the MCC on writs of *habeas corpus ad prosequendum* or *ad testificandum* are there because of their current involvement with local courts in criminal or other judicial proceedings and must make trips to court and visit with attorneys (*See* opinion, A 2697). Moreover, the other sentenced inmates who are designated to serve their sentences at the MCC generally have greater freedom to move throughout the institution (opinion, A 2695 n.3; 428 F. Supp. 333, 336).^{*} Thus, the factual underpinnings for the 60-day rule imposed by the Court are lacking in this record and the need for or propriety of the Court's rule is based on speculation and conjecture.^{**}

^{*} Moreover, as a result of the need to reduce the cadre in order to comply with the Court's previous prohibition on double-bunking (428 F. Supp. 333), at least some sentenced inmates at the MCC on writs are now working in various parts of the institution on work crews (Taylor Direct, A 1229-30). Again, this provides more movement for sentenced inmates.

^{**} To the extent that inmate testimony at trial might be thought to substantiate the presumed need for such a rule, it is interesting to note that appellees' main inmate witnesses on this issue, Michael Gardner and Albert Victory, requested to stay at the MCC even after their immediate involvement with the local courts had ended (RX-F, A1987; RX-XXX, A 2409; *see* petition

[Footnote continued on following page]

The District Court's characterization that confinement at the MCC is unduly "tense" and "frustrating" is also unsubstantiated. Although assuming as a general matter that there are "some obvious dangers of assault and other injuries" in a dormitory, the District Court acknowledged nonetheless that "the record before us lacks specific illustrations" of these presumed problems (opinion, A 2740 n. 23). This admission applies equally to the other living units at the MCC. As the Court concluded in rejecting the claim of insufficient staff "[t]here is no evidence of violence, or threats of violence, which could be prevented by additional guards, or for which there is an urgent need to add guards" (opinion, A 2797). Absent specific examples of violence or other anti-social behavior or, indeed, any other supporting evidence, the District Court's conclusion that confinement of more than 60 days at the MCC had unduly increased an inmate's level of tension or frustration is clearly erroneous.*

Likewise, the Court's conclusion—upon which it apparently based its assertion of statutory jurisdiction—that the MCC has been "perverted" from a facility "for brief periods of detention into a long-term prison" (opinion, A 2615) is ill-founded. As demonstrated above pp. 11-12), the the length-of-stay profile of inmates

in *Gardner v. Taylor*, 77 Civ. 1545 (S.D.N.Y.). Moreover, as indicated in Warden Taylor's affidavit (§§ 10, 13) on appellants' motion for a stay in this Court, only four inmates of more than 260 who were eligible requested to be transferred pursuant to this 60-day rule. This clearly demonstrates that inmates do *not* find continued confinement at the MCC unduly burdensome.

* The record testimony demonstrates that there is very little tension at the MCC (Camp Direct, A 1384-86; Camp Cross, A 1427-29). Moreover, both a psychiatrist and a consultant in the field of environmental psychology agreed that the modular units at the MCC provided more than sufficient space, variety and activity to meet the needs of the inmates confined there (Menninger Direct, A 1599-601; Bowen Direct, A 1703-06). See also p. 49n** above.

that have actually been incarcerated at the MCC since it opened in August, 1975 has conformed quite closely to the projections made by the Bureau when the MCC was being planned and designed: the vast majority of inmates remain at the MCC for 60 days or less.* Similarly, inmates are not generally being held at the MCC to serve their sentences,** but rather are at the MCC—regardless of the length of time—because of their ongoing, current involvement in judicial proceedings before the local courts.*** Given these facts it can not fairly be concluded that the Bureau has “perverted” the MCC into a long-term prison or that the appellants have acted arbitrarily or capriciously in violation of their constitutional or alleged statutory duties.

It is readily apparent, and confirmed in the affidavits of Norman Carlson and Warden Taylor submitted on the appellants’ motion for a stay in this Court, that the District Court’s 60-day rule also creates serious practical obstacles to the effective and fair operation of the federal

* The mean length of incarceration for all inmates is 51.21 days and the median is 16.35 days (Haines Affidavit, A 2482).

** With the obvious exception of the small sentenced cadre who have a relatively great deal mobility within the institution and, possibly, some inmates in the protective custody unit who face special security and safety problems because of their cooperation with the government. (See letter from protective custody inmate to the District Court, A 3023-25).

*** We note, as the District Court did in its subsequent memorandum (A 2825), that as the ultimate time limitations of the Speedy Trial Act go into effect, 18 U.S.C. §§ 3161-74, the length of incarceration for detainees should continue to decline; this reduction should also apply to sentenced individuals who are at MCC on writs as witnesses in criminal trials or for prosecution. We further note that a delay in a criminal trial—and possibly continued incarceration—beyond the time limitations of the Speedy Trial Act is not within the control of the appellants, but rather is controlled by specific exceptions under the Speedy Trial Act or by a finding of the trial court that it is in the interest of justice that the trial be delayed (18 U.S.C. § 3161(h)).

criminal justice system in the metropolitan area.* The need to transfer inmates from the MCC to surrounding local jails—and possibly, to more distant Bureau facilities—will likely cause disruptions in court schedules and, even under the best of circumstances, will be fatiguing for the affected inmates. The ability of counsel to confer with these inmates will also be impaired (*see* letter from counsel for appellees requesting that an inmate be retained at the MCC for preparation in this action as well as in a criminal proceeding, A 2409) to say nothing of the problems that will arise for the inmates and their families (*see* inmate's letter to the District Court, A3023-25). Moreover, the added expense and expenditure of staff time in shuttling inmates between those institutions and the courts will be substantial. *See Rhem v. Malcolm, supra*, 432 F. Supp. at 789.

One can only but conclude that the timely and efficient operation of the federal criminal justice system in the three local judicial districts will be hampered, and indeed, if it is necessary to return an individual on writ to the custody of the sending jurisdiction prior to disposition of pending criminal charges, further prosecution on those charges may well be jeopardized. *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3138 (U.S., Oct. 3, 1977).

In sum, then, the District Court's order is not supported by the facts in this record or the relevant case law and is unworkable as a practical matter. As expressed in the District Court's opinion, the alleged need for this 60-day rule is based upon the lack of a central indoor

* It should be noted that this form of relief was never requested by the appellees; rather, they sought the implementation of a pass system that would increase internal mobility for the inmates and the construction of an indoor gymnasium and central chapel.

gymnasium and chapel (opinion, A 2716-19). The record demonstrates that even without these central facilities, the MCC is, however, more than meeting its constitutional responsibilities for all inmates in the areas of physical exercise and religious practices, whether or not they remain at the MCC for more than 60 days.

The amount of recreation, *see* pp. 46-47 above, clearly exceeds the levels required in other cases. *See Rhem v. Malcolm*, *supra*, 396 F. Supp. at 1198 and 389 F. Supp. at 972. *See also O'Bryan v. County of Saginaw, Mich.*, *supra*, 437 F. Supp. at 592, 600 (two hours per week and an in-cell calisthenics program); *Moore v. Janing*, *supra*, 427 F. Supp. at 575; *Spain v. Procunier*, 408 F. Supp. 534, 547 (N.D. Cal. 1976); *Hamilton v. Landrieu*, 351 F. Supp. 549, 550 (E.D. La. 1971); *Alberti v. Sheriff of Harris County, Texas*, 406 F. Supp. 649, 677 (S.D. Tex. 1975). Moreover, many of the courts which have considered this issue have limited their orders as to the number of days of outdoor recreation to be provided with the qualification "weather conditions permitting." *Moore v. Janing*, *supra*; *Nadeau v. Helgeson*, 423 F. Supp. 1250, 1269 (D.N.H. 1976), *aff'd in part, rev'd in part*, 561 F.2d 411 (1st Cir. 1977); *Mitchell v. Untreiner*, 421 F. Supp. 886, 910 (N.D. Fla. 1976); *Spain v. Procunier*, *supra*; *Alberti v. Sheriff of Harris County, Texas*, *supra*. With respect to indoor recreation, the courts have required only that inmates be permitted out of their cells and that some exercise programs or facility be available. *Eg.*, *Brenneman v. Madigan*, *supra*, 343 F. Supp. at 140; *Jones v. Wittenberg*, *supra*, 330 F. Supp. at 717. No court has required the construction and equipping of an indoor gymnasium. *See Miller v. Carson*, *supra*, 401 F. Supp. at 892-93 (fully equipped gymnasium not required).

Similarly, there is a wide variety of religious programs at the MCC (RX-J, L, O, A 1995-96, 2002-32) which more than satisfy inmates' First Amendment

right to freedom of religion. See *Cruz v. Beto*, *supra*, 405 U.S. at 323 n.2; *Gittlemacker v. Prasse*, 428 F.2d 1, 4-5 (3rd Cir. 1970).

POINT IV

The District Court Erred in Prohibiting Any Increase in Capacity

A. The District Court's Order Reducing the Capacity of the Dormitories Was Error

At the outset, it is critical to note that as a general matter, the dormitories are used to house sentenced inmates and not pretrial detainees (Stip. of Facts, ¶ XII-2, A 2546-47). Indeed, the record is clear that early in the life of the MCC, the Warden made a decision to minimize the burdens on pretrial detainees of the need to increase the capacity of the dormitories by transferring them out of that unit and assigning sentenced inmates there (*Id.*). This is not to say that on occasion a pretrial detainee may not be housed there temporarily until a room becomes available on a pretrial unit (see, e.g., Taylor Direct, A 1274; Scher Direct, A 1461-62; Stip. of Facts, ¶ XII-1, A 2546). In this regard, we note, however, that the appellees presented no evidence that this has actually occurred as a consistent practice in the dormitory unit.

Thus, given this housing pattern, the powers of the District Court to limit the capacity of the dormitories is sharply limited to the bounds of the Eighth Amendment—whether the present conditions constitute “cruel and unusual punishment” for the inmates assigned there. See *Sostre v. McGinnis*, *supra*, 442 F.2d at 190-94. The

facts, we submit, simply do not describe unconstitutional conditions.*

As to the District Court's characterization that the situation in the dormitory is one of "intolerable crowding" (opinion, A 2740), the record here indicates the contrary: At the present increased capacity of 120 bed spaces, each inmate assigned there has more than 68 square feet of living space (Appendix A).** This figure, although slightly less than the 75 square feet figure which the Court in *Ambrose* required for *pretrial detainees*, 414 F. Supp. at 489, exceeds the figures that courts have found constitutionally acceptable for sentenced inmates. *Pugh v. Locke*, *supra*, 406 F. Supp. at 334 (60 square feet of living space) and *Newman v. State of Alabama*, *supra*, 559 F.2d at 288; *Gates v. Collier*, *supra*, 423 F. Supp. at 743 (50 square feet of living space). See also *Williams v. Edwards*, 547 F.2d 1206, 1215 (5th Cir. 1977).

The record further demonstrates that the other factors relied upon by the District Court—noise, the alleged grossly inadequate toilet facilities and insufficient cooking and visiting facilities (opinion, A 2740-41) — do not individually or together amount to a deprivation of constitutional rights. First, at the end of appellees' direct case, the District Court dismissed their claims as to

* We do not read the District Court's opinion to order reduction of capacity based upon alleged statutory duties (opinion, A 2740).

** Although the District Court questioned the relevance of appellants' "living space" computation, we note that this formulation follows exactly the computation adopted by Judge Lasker in *Ambrose v. Malcolm*, *supra*, 414 F. Supp. at 489. Likewise the "modular principle" here does not affect the result (contrary to the District Court's suggestion) since as demonstrated above, inmates have access to an abundant variety of activities including movement off the housing unit during their stay at the MCC.

excessive noise at the MCC (A 1163-68). In doing so, the Court specifically stated that even in the dormitory—in the Court's words, "the most crowded"—"the level of noise I will state for the record was entirely tolerable" (A 1166).^{*} Likewise, as to the alleged grossly inadequate toilet facilities, there is one shower, one toilet, one urinal, and two washbasins for every 20 inmates (Stip. of Facts, ¶ I-1, A 2521). While it is true that this is below a "commonly accepted" standard of one set of bathroom fixtures for every 15 individuals (Silver Dep., RX-YYY, A 2463; *see* opinion, A 2740 n.22), we do not believe that this deficiency amounts to a "grossly inadequate" or unconstitutional condition.^{**}

Further, the cooking facilities and the visiting facilities for the present increased capacity of the dormitory unit are adequate. The record is clear that these facilities have been expanded in this unit because of the increased capacity: The dormitory unit has two microwave ovens to heat the inmates' meals (Stip. of Facts, ¶ I-1, A 2523), whereas all the other, smaller units have only one such oven; moreover, the visiting hours for this unit are 3½ hours longer on both Saturdays and Sundays in order to

^{*} This conclusion by the District Court renders worthless the opinion of David Fogel, appellees' expert, since in condemning the conditions in the dormitories he focused on the alleged excessive noise which he noted is the "first thing that hits you" (Fogel Direct, A 1121).

^{**} It is clear that recommended or accepted standards differ. *See Ambrose v. Malcolm, supra*, 414 F. Supp. at 490; Nagel Cross, A 729-30; Conway Dep., PX-167, A 1952. Further, Glenn Miller testified that at the Westchester County Jail, there was only one shower for every 30 inmates (Miller Cross, A 894-95). In any event, recommended standards, although relevant to this Court's deliberations can not *per se* define the constitutional standard since "[A] prison system that would be excellent from the point of view of a modern prison administrator may not be required by the provisions of the Constitution with which this Court is concerned." *Holt v. Sarver, supra*, 309 F. Supp. at 369.

accommodate the larger volume of visiting for this unit (opinion, A 2749).*

Although the District Court further adverted to "an obvious potential for the tensions of stretched nerves" (opinion, A 2740) to justify its ordered reduction in capacity of the dormitory, there is simply no objective or credible evidence in the record to support the District Court's assumption. As the District Court acknowledged, "the record . . . lacks specific illustrations" of "assault[s] and other injuries" in the dormitories (*Id.*, A 2740 n23).** Moreover, Dr. Hugh Bowen, an environmental psychologist (Bowen Direct, A 1701-02), concluded after visiting the dormitories that an inmate's secondary needs

*More telephone services are also provided to this unit. (Judgment, ¶ 13(a) and (b), A 2894-95).

**This findings by the District Court again neutralizes the general and unverified testimony of appellees' experts, Dr. Rundle and Mr. Nagel, concerning the alleged dangers of assaults and other injuries resulting from the increased capacity of dormitories (*e.g.*, Rundle Direct and Cross, A 743-44, 793, 798, 801-02, 806-07; Nagel Cross, A 1089). Indeed, the specific testimony of inmate Glenn Miller is the most dramatic refutation of those general presumptions. Miller testified that during the approximately four months in which he was housed in the dormitory (Miller Direct, A 813) only once did he seek medical help for an alleged sleeping problem or anxiety, and on that occasion after taking pills for one week, he discontinued them because he felt "they weren't necessary any more" (Miller Cross, A 883-84). Moreover, he also testified that upon requesting other inmates to lower the volume of their radios or shut them off, "Most of the time [they] would at least turn them down" (*Id.*, A 884). As to thefts and fear of assault, Miller testified only that he had lost a bowl of sugar, and that although he had been in the dormitory for four months, he had never been in a fight nor had he observed any fights or assaults in the dorm rooms (*Id.*, A 885). Compare, *Williams v. Edwards*, *supra*, 547 F.2d at 1211; *Pugh v. Locke*, *supra*, 406 F. Supp at 325; *Gates v. Collier*, *supra*, 349 F. Supp. at 889.

for privacy could be met in dormitories (*Id.*, 1708-09)!* Likewise, Dr. George Camp testified that there was very little tension at the MCC and that rapport among inmates and between staff and inmates was quite good (Camp Direct and Cross, A 1384-86, 1427-29).

In short, while the capacity in the dormitory unit is not what the Bureau originally intended, the conditions under the present capacity of 120 inmates still provide inmates with an adequate level of basic services and safety. As the Fifth Circuit recently stated in *Newman v. State of Alabama*, *supra*, 559 F.2d at 291, "If the [government] furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical and emotional deterioration."

In ordering the MCC dormitory—and more generally, the institution as a whole—reduced to its rated capacity without *any* deviation, the District Court, we submit, has taken an overly simplistic and mechanistic approach to the problem of providing proper housing for the present swollen prison population which can not be justified by

* Although noting that conditions in the dormitory were less than ideal, Dr. Bowen concluded that only exposure of "certain individuals" to that situation for "long duration stays" might possibly lead to serious harm (*Id.*, A 1719). See pp. 11-12 above for the length of stay statistics at the MCC. In addition, the MCC uses Unit 11-North (non-dormitory) as a "spill over" unit for writ cases and other sentenced inmates (Scher, A1460). The record testimony also suggests that an inmate from the dormitory can be transferred into this other unit (Miller Cross, A 884-85).

"the case law or sound public policy." Although "rated capacity" may be relevant in determining the number of inmates that may properly be housed in a facility, *Detainees, supra*, such a standard does not amount to a "per se constitutional limitation" since "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." *Newman v. State of Alabama, supra*, 559 F.2d at 288. Indeed, Judge Lasker in *Ambrose v. Malcolm, supra*, clearly recognized this by sanctioning an increase above rated capacity in the dormitories at the Bronx House of Detention where pretrial detainees—and not, as here convicted inmates—are housed. 414 F. Supp. at 494-95.

Further, the reasons set forth by the District Court for refusing to draw the line beyond the rated capacity are simply untenable. The statement by the District Court that appellants' need to exceed rated capacity in a variety of ways "counsels against sanctioning any departure of this kind" (opinion, A 2742), suggests a somewhat punitive thrust to its ruling, which surely is at odds with the remedial and equitable nature of a court's powers in a case such as this. In any event, as even appellees' correctional expert acknowledged, Nagel Direct, A 696, a detention facility or prison such as MCC can not control its intake of new inmates; rather, that power lies elsewhere. Furthermore, contrary to the District Court's assertion (opinion, A 2742), the record contains ample data to permit the District Court to set a number above the rated capacity which would be consistent with recognized "accepted" or "recommended"

* Compare the District Court's statement in its summary judgment opinion that given the problems of increased population, "prison authorities . . . would presumably move (or return) to the use of dormitories, with their greater flexibility and separate toilet facilities." 428 F. Supp. at 339.

standards.* For instance, taking the "accepted standard" of one set of bathroom fixtures per 15 inmates, the dormitories could properly house 90 inmates (see Stip. of Facts, ¶ I-1, A 2521 wherein it is stipulated that the dormitory unit has 6 sets of bathroom fixtures). Alternatively, adopting the approach taken by the District Court in *Ambrose, supra*, wherein it required that each inmate be provided with 75 square feet of living space, 414 F. Supp. at 494-95, the dormitories here can house a total of 108 inmates.** The District Court offered no persuasive reason for not engaging in such analysis.

B. The District Court Erred in Granting Summary Judgment In Appellees' Favor on the Issue of Double-bunking, and This Court Should Now Direct Entry of Judgment In Appellants' Favor

Asserting that the MCC's practice of double-bunking was controlled by *Detainees, supra*, and evolving standards of decency, the District Court concluded in its summary judgment opinion that double-bunking at MCC was impermissible for anyone confined there, either pretrial detainees or convicted inmates, 428 F. Supp. at 335-40. Given the total environment at MCC and the un rebutted evidence in this record that double-bunking there has had no serious negative effects on inmates, the District Court, we submit, went far beyond the teachings of *Detainees* and contemporary standards of decency, and announced a *per se* rule against double-bunking. Such a rule is not supported by the case law and should be reversed by this Court.

* In so arguing, we do not, however, concede that the present capacity of 120 is not in conformity with the requirements of the Constitution.

** This number is determined by dividing 75 sq. ft. into the overall square footage of the dormitory unit (8112.18 sq. ft.) (See Appendix A).

"While this Court's decision in *Detainees* must be considered the starting point for resolution of this issue, the clear and marked differences in the physical environment there and the environment at MCC precludes it as controlling precedent in this case.* This Court, perhaps best, summarized the stark conditions in *Detainees*:

What we are faced with here is whether double ceiling in a cell 5 x 8 feet, 40 square feet of floor space, creates such dehumanizing conditions as to deprive the detainees of their constitutional rights of due process and equal protection. When a detainee is crammed into a 5 x 8 foot cell designed for single occupancy with another detainee for fourteen to sixteen hours per day for an average of sixteen weeks, he is forced to suffer numerous indignities, invasion of privacy and risk of harm to his person and property. 520 F.2d at 398.

The differences at MCC are many and substantial. Rather than barred cells, the MCC has rooms, 428 F. Supp. at 335-36. Whereas the cells in *Detainees* had 40 square feet of floor space, 520 F.2d at 396, the smallest room at the MCC is almost double that amount, i.e., 75.9 square feet; the double-bunked rooms in the Honor Unit

* In recognition of the startling contrast in the totality of the environments at the MCC and the institutions at issue in *Detainees* and the importance such a contrast might properly play in the Court's judgment on this issue, the appellants requested that the District Court tour not only MCC but also one or the other of the jails involved in *Detainees* (Memorandum of Law in Opposition to Relators' Motion for Partial Summary Judgment and In Support of Respondents' Motion for Partial Summary Judgment, p. 36 n. R. 11 in Dkt. No. 77-2035). Although adopting the appellant's suggestion with respect to visiting MCC, 428 F. Supp. at 335, the Court declined to tour either the Brooklyn or Queens House of Detention. At the time of the Court's tour of MCC, appellants' counsel again requested, without success, that the District Court visit Queens or Brooklyn.

contain substantially over 100 square feet (*Id.*).* Also, inmates at the MCC are locked in their rooms only from approximately 11:00 P.M. to 6:00 A.M. (7½ hours) — which are normal sleeping hours—and during head counts (Government's Rule 9 (g) Statement, ¶ 7, A 82-83; 428 F. Supp. at 338), whereas in *Detainees* inmates were locked in their cells for "fourteen to sixteen hours per day." 520 F.2d at 398. During the approximately 16 hours each day that inmates at the MCC are *not* locked in their rooms, they have unrestricted access to the commons areas in their units.** Moreover, the average length of time that inmates spend at MCC is substantially below that in *Detainees*: while the vast majority of the individuals confined at MCC leave or are released within 60 days,*** 428 F. Supp. at 388, the length of incarceration in *Detainees* was "an average of sixteen weeks." 520 F.2d at 398.

Although advertent to these and other differences between MCC and the decided cases, the Court gave them little, if any, weight either individually or cumulatively.**** Rather, the District Court focused primarily

* We again wish to note that a total of 73 rooms—not 121 as the District Court stated, 428 F. Supp. at 336—were double-bunked prior to the Court's order. See p. 13n.* above.

** See pp. 46-47 above for a description of the activities and facilities available to inmates on each of the living units.

*** Appellees did not contest those statistics, and in any event, they have been substantially confirmed by appellants' more comprehensive study admitted into evidence at the trial. See pp. 11-12 above.

**** The District Court's characterization that an inmate's days at MCC are spent in "dreary emptiness" as compared to an inmate's days in the facilities involved in *Detainees* is totally unwarranted. As this Court noted in *Detainees* in those institutions the gym facilities were inadequate and were available only once or twice a week to detainees. 520 F.2d at 395. Compare the District Court findings here (opinion, A 2716); see also inmate's letter to the District Court, A 3023-25).

on two aspects of double-bunking at the MCC—the so-called “oppressive consequences” in the commons areas, and the presence of a toilet in the double-bunked rooms, 428 F. Supp. 338-39—and concluded that basic concepts of decency had been violated. Such a conclusion cannot, however, withstand analysis.

The alleged “oppressive consequences” in the commons areas are simply not supported by objective facts. Even with the double-bunked conditions, MCC still afforded each inmate a more than ample amount of “living space” as defined in *Ambrose v. Malcolm, supra*.^{*} In the double-bunked units of MCC, each inmate was afforded at least 100 square feet of living space, more than 40% higher than the recommended average of 75 square feet (See Appendix B). The District Court’s suggestion that the double-bunked units were impermissibly “noisy”, 428 F. Supp. at 337, is completely unsubstantiated since it ultimately dismissed appellees’ noise claim (even as to the dormitory with 120 inmates) at the end of appellees’ direct case. See pp. 55-56 above. Moreover, although the District Court concluded that the eating tables are “less adequate” and that there “is more pressure to eat in the cell”, 428 F. Supp. at 337, there was no evidence to support such conclusions. Appellees offered no evidence by way of inmate affidavits or otherwise on this issue. To the contrary, in the Honor Unit and Unit 7-North, for instance, there were clearly a sufficient number of tables^{**} to seat the whole unit at

^{*} Although that case involved dormitory living, it would nonetheless seem helpful and relevant here in discussing standards for minimum square footage of total “living space.”

^{**} Assuming 4 people at each table.

double-bunked capacity at the same time (Government's Rule 9(g) Statement, ¶ I-1, A 51-55, 65-66).*

The presence of a toilet in the double-bunked room at MCC, while possibly not esthetically pleasing, cannot be equated with unconstitutionality, particularly since individuals are locked into their rooms for any significant period of time only during normal sleeping hours. In *Detainees*, the problem that the presence of a toilet created was prolonged, constant and exacerbated by operating procedures there: Detainees were locked in their cells "for fourteen to sixteen hours a day", 520 F.2d at 398; moreover, many detainees testified that because they were locked-in during mealtime, one detainee had to eat his meals "siting either on the bed or toilet", 520 F.2d at 396, or indeed, that the toilet would be in use by one detainee "while the other [was] eating close by. . . ." *Id.*

No such condition or testimony is present in this case. Contrary to the implication in the District Court's opinion, 428 F. Supp. at 339, inmates are not subject to forced exposure to an open toilet at mealtime. Further, there is no forced exposure to a toilet in use during the waking hours of the day since inmates are free to leave their rooms. Although there is a period of time — as the District Court noted, in "the middle of the night", 428 F. Supp. at 339—in which an inmate may be exposed to use of the toilet, we submit that

* To the extent that insufficient table space may have been a problem in the other two units—and to conclude such on this record would be speculative at best—the District Court more properly could have remedied this by directing that a few more tables be made available at mealtimes. Indeed, collapsible conference-type tables are available for use on the 11-South dormitory unit (Transcript of the Court's tour, A 1058-60). In any event, the discomfort of eating in a cell is not, of itself, an unconstitutional hardship. *Detainees*, *supra*, 520 F.2d at 396 n.3.

such a condition can not fairly be characterized as unconstitutional, either singularly or in combination with the other matters discussed by the District Court. In measuring what conditions a detainee can properly be exposed to, the conditions or acts "must do more than 'offend some fastidious squeamishness or private sentimentalism . . .'; they must be such as 'to offend even hardened sensibilities,' . . . or constitute force that is 'brutal' and 'offensive to human dignity'." *Johnson v. Glick*, 481 F.2d 1028, 1033 n.6 (2d Cir. 1973) (Friendly, C.J.), quoting from *Rochin v. California*, 342 U.S. 167, 172, 174 (1952). Cf. *Johnson v. Lark*, *supra*, 365 F. Supp. at 304.

The District Court also relied upon the architect's statement that these rooms were intended for single occupancy, 428 F. Supp. at 336-37. The architect's statement, however, simply reiterates the obvious: by installing double-bunks the intended or rated capacity of the residential rooms has been exceeded. Nonetheless, since inmates are only locked in those rooms during normal sleeping hours and more than ample living space is available to each inmate, the fact that intended capacity has been exceeded should not *per se* be equated with an unconstitutional condition. As the Court stated in *Newman v. State of Alabama*, *supra*, 559 F.2d at 288, "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." See *Ambrose v. Malcolm*, *supra*, 414 F. Supp. at 494-95. Likewise, although recommended standards promulgated by corrections groups—including the recommendation that inmates be housed in single cells—should properly be considered in evaluating the acceptability of conditions in a detention center, such recommendations should not be held *per se* to define the con-

stitutional standard. See *Holt v. Sarver*, *supra*, 309 F. Supp. at 369.*

Moreover, left un rebutted in this record is the affidavit of Dr. Menninger (A 117-23) in which he concluded, after reviewing the actual conditions at MCC, that

"double-bunking" as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution. Some important factors which prompt me to reach this conclusion are (a) the architectural design and finish of the residential rooms and common areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two count periods), and length of stay (majority of pretrial detainees are in the MCC 20 days or less). Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear

* Indeed, if the constitutional standard were defined by such recommended standards, then even single-cell occupancy in the 40 square feet cells in the New York City detention centers would be prohibited since those cells do not meet the square footage standard set by the American Correctional Association:

All cells should be designed for the use of one prisoner. The minimum clear size of an interior cell should be approximately 50 square feet, with an elevation of not less than 8 feet.

American Correctional Association, Manual of Correctional Standards 49 quoted in *Detainees*, *supra*, 520 F.2d at 396 (emphasis added; footnote omitted).

to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of deviant sexual or aggressive impulses or tendencies.

At the District Court's request, appellees supplied the Court (but not appellants' counsel*) with copies of the psychiatric testimony in *Detainees* and *Rhem*. After reviewing that testimony and weighing it against the affidavit of Dr. Menninger, the Court concluded that given the apparently conflicting views in the psychiatric community, it was free to reject Dr. Menninger's opinions. Such a conclusion was erroneous. The psychiatric testimony supplied by appellees was set in the specific factual contexts of the *Detainees* and *Rhem* cases. Given the substantial and varied differences of the environment in those cases from that at MCC, that testimony is valueless in evaluating the acceptability of the specific conditions at MCC. On the other hand, Dr. Menninger's affidavit is the *only* expert evaluation of the specific conditions at MCC and thus must be given conclusive weight if, as this Court has suggested, prison condition cases must be decided on the actual facts and conditions present at the particular institution. *Detainees, supra*, 520 F.2d at 399.

Contrary to the District Court's assertion, 428 F. Supp. at 339, appellants are not requesting the Court to relitigate matters which are "self-evident or readily demonstrable"; rather, we suggest that after accounting

* Indeed, appellant's counsel was not informed of the request until after the transcript had been delivered to the District Court on January 3, 1977. Although counsel for appellees' office is located in the Courthouse just a short distance over a covered walkway from the office of counsel for appellants, counsel chose to inform appellants by regular mail, thereby resulting in appellants receiving notice of the Court's request and appellees' response the day before the Court issued its opinion (See A 3037).

for contemporary standards of decency, the physical and operating environment at MCC is such to "permit double celling without deprivations of a detainee's rights." *Detainees, supra*, 520 F.2d at 398. Certainly, the record presented by the appellees was fundamentally deficient in demonstrating the contrary and can not justify summary judgment in appellees' favor. See *Forre v. Ward, supra*, slip op. 575.

Perhaps the best illustration of the District Court's *per se*—and ultimately incorrect—approach to the issue of double-bunking at the MCC is its refusal to permit double-bunking of even sentenced inmates, or to permit inmates, either pretrial or sentenced, to waive this prohibition (428 F. Supp. at 339; A 3065). The case law simply does not support the District Court's actions: First, the Court in *Inmates of Suffolk County Jail v. Eisenstadt, supra*, 360 F. Supp. at 690 in prohibiting double-celling of pretrial detainees specifically stated that "sentenced inmates . . . may continue to be confined two per cell . . ." See *Detainees, supra*, 520 F.2d at 399. Cf., *Müller v. Carson, supra*, 401 F. Supp. at 899. Given the fundamentally different—and more humane—environment at the MCC, that rule seems properly applicable here.* Second, despite the appellants' specific request

* To the extent that double-bunking of sentenced inmates has occurred in the Honor Unit, the rooms there are substantially larger—providing at least 50 square feet per individual—and are left unlocked at night, permitting inmates in need of toilet facilities to use those located in the adjacent common area (Government's Rule 9(g) Statement, ¶¶ 1 and 7(a), A 54, 82), thereby vitiating the main concerns expressed by the District Court. Considered together, these conditions can hardly be characterized as violative of "civilized standards of human decency." *Wright v. McMann, supra*, 387 F.2d at 528.

In arguing that the District Court should have permitted double-bunking at least of sentenced inmates, appellants do not concede that double-bunking of pretrial detainees at the MCC is impermissible or unconstitutional.

(A 3050-51), the District Court refused to include in the order a provision that would permit double-bunking when two individuals have voluntarily consented to the arrangement.* As appellants' pointed out to the District Court, such a voluntary waiver provision was included in the judgment entered by Judge Judd in *Detainees* and ultimately affirmed by this Court. *Detainees, supra*, 520 F.2d at 395. Moreover, more recently, the District Court in *Rhem* suggested that, notwithstanding the more severe (and ultimately unconstitutional) conditions at MHD, that facility might properly be used to hold detainees "who knowingly consent to be housed at MHD in preference to being detained at other City facilities." 432 F. Supp. at 789. The District Court's failure to include a waiver provision again demonstrates the error of its approach to the issue of double-bunking and warrants reversal of its order.

In this regard, although appellants did not move for summary judgment on this issue in the District Court, we believe that appellants are entitled to this relief and that in the interests of justice and judicial economy this Court should remand this issue to the District Court with instructions to enter summary judgment in appellants' favor.

The law is clear that this Court has the power to instruct the District Court to enter summary judgment in favor of the appellants even though they did not move below. *E.g., Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165-66 (2d Cir. 1971) (Friendly, C.J.), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum*

* Appellants also requested that the District Court provide for double-bunking in certified emergencies (A 3050-51). Although the District Court initially denied that request, it has now included an emergency provision in the judgment (Judgment, ¶ 9, A 2890-91).

Corp., 411 U.S. 482(1973); see *Uzzell v. Friday*, 547 F.2d 801, 804-05 (4th Cir. 1976). This is true "[even] where the non-movant vigorously opposes a motion for summary judgment on [the] ground triable issues of fact exist . . ." 6 W.J. Moore, Federal Practice, ¶ 56.12, p. 56-334 (1976).

The issue of double-bunking is clearly appropriate for this disposition. As demonstrated above, the essential facts regarding living space, lock-in time and length of confinement are undisputed. Moreover, the only evidence in this record regarding the alleged effects of double-bunking at the MCC is the affidavit of Dr. Menninger, in which he concluded that double-bunking at the MCC did not impose serious consequences on the affected inmates. In response, the appellees offered only expert testimony from other cases which, we submit, was completely irrelevant to the issue here because of the fundamentally different, and substantially inferior, conditions in those institutions. Appellees, we submit, were required to come forward with evidence properly responsive to Dr. Menninger's affidavit, cf. *Friedman v. Beame*, 558 F.2d 1107, 1112 n. 11 (2d Cir. 1977), and their apparent choice not to submit such evidence should not now preclude summary judgment in appellants' favor.*

More fundamentally, given the undisputed nature of the objective facts, we believe that it is appropriate for this Court to direct summary judgment in appellants' favor since, in reality, the only dispute is on ultimate or constitutional facts which "are not 'provable' in the usual sense and are part and parcel of the constitutional judgment [this Court] must make." *Fortin v. Darlington Little League, Inc.*, *supra*, 514 F.2d at 349.

* We note, for instance, that appellants' psychiatric expert Dr. Rundle toured the MCC, including the double-bunked units, prior to appellees' motion for summary judgment and appellants' submission of Dr. Menninger's affidavit (Rundle Direct, A 741).

C. The District Court Had No Authority To Prohibit The Use Of Commons Areas For Temporary Housing

The only basis asserted by the District Court for prohibiting the use of commons areas to temporarily house inmates was that the appellants had acted "arbitrarily and capriciously, in violation of their statutory duties, in allowing such a condition to prevail" (opinion, A 2744; *see id.*, A 2746). As demonstrated above, pp. 19-25, neither the Bureau's enabling statutes nor the APA confer jurisdiction on the District Court to review conditions of confinement and, therefore, its order on this issue must be reversed.

In addition, this challenged condition is neither a violation of appellants' statutory duties, nor a violation of the constitutional rights of inmates. The appellants do not believe that the use of commons areas for temporarily housing inmates until a room or dormitory space becomes available is a desirable situation (*see* opinion, A 2744). However, given the number of inmates—both pretrial and sentenced—being committed to the MCC's custody each day, the MCC and the Bureau has had no choice but to resort to this temporary expedient and the resulting conditions are well above the level required by the Constitution.

Contrary to the implication of the District Court's opinion (A 2744-45), the record demonstrates that under the circumstances, the appellants have done all that can reasonably be expected to minimize the use of the commons areas as temporary housing facilities. First, the MCC was designed to accommodate an inmate population 50% larger than that at West Street—the capacity was increased from approximately 300 inmates at West Street to 449 inmates at the MCC (*see* 1965 Hearings, RX-000,

A 2371; 1970 Hearings, RX-QQQ, A 2376-77; Tentative Outline, RX-CCC, A 2122). It was only due to the "unprecedented" rise in prison population that commenced in 1975 (Carlson Direct, A 1671) — after the MCC was substantially constructed and just prior to its opening in August, 1975—that the MCC was forced to adopt the practice of temporarily using the commons areas to house inmates. In face of these facts, the District Court's assertion that the appellants "fail[ed] to plan for the most obvious of needs" (opinion, A 2745-46) is wholly unwarranted. Second, subsequent to the opening of MCC, the Bureau and the MCC have taken a number of significant steps to ensure that virtually all available space at the MCC is utilized to house pretrial detainees and writ cases. (See pp. 12-17 above; *see also*, opinion, A 2744). Third, as the District Court noted, the MCC has attempted to minimize the use of the commons areas (opinion, A 2743) and, indeed, has developed a "seniority" system so that an individual on the balcony the longest is the first to be assigned to a room when rooms becomes available (Stip. of Facts, ¶ I-6, A 2529).^{*} The result of these efforts, and except for the period when in late 1975 and early 1976 overcrowding was first experienced at the MCC, the duration of such an occurrence for an inmate has been a minimum of just a few nights at a time (Miller Direct, A 825; Norman ^{**} Direct, A 1040-41; Gardner Direct, A 442).^{***}

^{*} See also Warden Taylor's testimony that:

"My position, being right or wrong I guess, is that if there is an empty room in a pre-trial unit and there is a sentenced prisoner sleeping on the balcony, at least for that brief period of time I will give him the empty room (Taylor Cross, A 1274)."

^{**} Jennings Norman is a correctional officer at the MCC called as a witness by appellees.

^{***} When MCC first experienced overcrowding, the duration was longer: When John Parker first arrived at the MCC on

[Footnote continued on following page]

Although the District Court apparently concluded that expert testimony on this issue was not necessary (opinion, A 2745 n.27), it is nonetheless helpful, we submit, to review that testimony: appellees' experts testified in a general manner to the obvious—that it is not desirable to house inmates, even temporarily, in these common areas. (Nagel Direct, A 696; Kundle Direct, A 747; Conway Dep., PX-167, A 1947). In contrast, again, is the testimony of the experts called by the appellants which, we submit, provides the only relevant observations on this issue: Dr. Menninger concluded that "most people could tolerate and deal" with temporary housing in a commons area if they perceived that such a situation was not "arbitrarily set up" and was "due to external factors" (Menninger Direct, A 1598-99).^{*} Likewise, Dr. Bowen testified that,

October 4, 1975 (Parker Direct, A 554), he was housed in a corridor for four days (*Id.*, A 555); when Albert Victory arrived at the MCC in November, 1975 (Victory Direct, A 961) he was assigned to the balcony for five days (*Id.*, A 962).

Michael Gardner had the longest stay on the balcony during this initial period. Although he testified that in October-November, 1975 he was on the balcony of 5 North for "about eight and ten weeks" (Gardner Direct A 453-54), the facts again show that Gardner has seriously distorted the truth. The MCC Daily Population Logs-Commitments (Exh. XXII-4 to the Stip. of Facts, A 2686) for the month of September indicate that the Gardner arrived at the MCC on September 24, 1975; the MCC court call-out list for October 17, 1975 indicates that Gardner had been assigned a room on 5 North by that date (RX-NN, A 2070). Thus, assuming that Gardner had been assigned to a cot upon his arrival on September 24, he had been on a cot for a total of 23 days, *not* eight to ten weeks.

^{*} Michael Gardner's testimony about his stay on the balcony in 5 North illustrates the acuity of this observation. His time on the balcony (approximately 3 weeks) apparently left no lasting impression on Mr. Gardner since, at a pretrial deposition when asked to list his housing assignments at the MCC in the fall of 1975, Gardner failed to mention this at all (Gardner Cross,

[Footnote continued on following page]

although undesirable, "for a very short period of time/as a temporary expedient, we can all put up with this kind of impingement" (Bowen Direct, A 1710).

In sum, then, the evidence in this record demonstrates that the need to provide temporary housing in commons areas at the MCC has been minimized, and when it does presently occur, is lasting for tolerably short periods of time. Given all the circumstances, this practice at MCC represents neither arbitrary and capricious conduct nor unconstitutional conditions, and the District Court's order should be reversed.

POINT V

The District Court Erred By Issuing Injunctive Orders on the Issues of Classification, Family and Social Visiting, Attorney Visiting and Telephone Services

The District Court issued a series of injunctive orders regarding classification (judgment, ¶ 1, A 2884-85), social and family visiting (*id.*, ¶ 10, A 2891-92), attorney visits (*id.*, ¶ 11, A 2893), and telephones (*id.*, ¶ 13, A 2894-97). Neither the record here nor the case law support the entry of such injunctions and the District Court's judgment should be reversed.

A 541). It was only after he began to prepare his testimony for trial that he remembered this incident (*id.*) and in ultimately testifying about it at trial, he attributed no ill or arbitrary motives to officials at MCC for using this housing arrangement ("The building was crowded at that point of time, I assume..." *Id.*, A 439). See also the comment of Albert Victory that "I got out of there quickly, four or five days I was on the balcony" (Victory Direct, A 962).

A. The MCC Is Properly Classifying And Separating Inmates And Therefore No Order Is Necessary

Although the District Court's opinion on the issue of classification is written in broad and sweeping terms and suggests that MCC has undertaken no effort to classify and separate pretrial detainees from convicted inmates, or individuals who pose a serious threat of violence from those who do not, the facts in this record, conclusively demonstrate the contrary. Moreover, since the judgment entered by the District Court on this issue substantially embodies the MCC's classification efforts as described in the record, the District Court should *not* have entered an order.

The MCC policy is to house pretrial detainees in residential units separate from convicted inmates to the maximum extent possible (Taylor Direct, A 1239; Scher Direct, A 1460-62). Exceptions to this policy find their origins in and are limited to instances when it is necessary to use all available rooms in order to house inmates being committed to MCC's custody. For instance, in order to minimize the use of the commons areas for sleeping accommodations the Warden has adopted the rule that "if there is an empty room in a pretrial unit and there is a sentenced prisoner sleeping on the balcony, at least for that brief period of time I will give him the empty room" (Taylor Cross, A 1274); however, as soon as a room becomes available on the appropriate unit, the individual is transferred there (Scher Direct, A 1461-62; see Harmison Cross, A 1526). Likewise, in a specialized unit such as the women's unit (5 South) pretrial detainees and convicted female inmates are also housed together. Since the average number of women (both pretrial and convicted) at the MCC at any one time is generally well below the capacity of a single 48-person unit (See MCC Daily Population Logs which are incorporated as Exh. I-4 to the Stip. of Facts), there would be many unoccupied rooms (at least half) if the MCC had created

a separate unit for pre-trial women and a separate unit for convicted women.* Given population pressures facing the MCC, such unused capacity would be totally unacceptable. In another special unit, 9 South, pretrial detainees may also be housed with convicted inmates (Scher Direct, A 1460). This is used to house those individuals committed to MCC's custody who present a threat to the security of the institution or others, or are otherwise in need of close supervision (Stip. of Facts, ¶ XII-2, A 2546-47; Scher Direct, A 1460; Taylor Direct, A 1239).

Appellees argued below that this system of separation was insufficient and, indeed, that appellants had not demonstrated that it was actually used at the MCC. As demonstrated above, the evidence belies those assertions, and given that evidence, it was appellees burden to show that the system was not working properly. Perhaps the clearest demonstration that appellees have failed to carry this burden is the *total* absence of any verified instances of violence in this record (*See* opinion, A 2740 n. 23, and A 2797).**

* Gary Mote testified that as the prison population started to rise during the planning of the MCC, it was decided not to house women at the MCC and to contract with local facilities for their housing in order to maximize the use of space at MCC (Mote Direct, A 1648). Just prior to opening MCC, the Bureau was, however, approached by members of the courts from the Southern District and Eastern Districts of New York who requested the Bureau to keep women at the MCC because of anticipated problems in housing them at surrounding local facilities (*Id.*, Trial Transcript, p. 2802).

** Compare *Williams v. Edwards*, *supra*, 547 F.2d at 1211 in which the record established "270 stabbings of inmates by other inmates . . . , 20 deaths resulted," "numerous 'forcible rapes' were committed on inmates by other inmates, the total number unknown"; *Pugh v. Locke*, *supra*, 406 F Supp. at 325 ("The evidence reflects that most prisoners carry some form of home-made or contraband weapon which they consider to be necessary for self-protection."); *Gates v. Collier*, *supra*, 349 F. Supp. at

[Footnote continued on following page]

Beyond this complete failure of proof, the District Court recognized and implicitly sanctioned the propriety of the MCC's classification and separation system by incorporating its major features, and exceptions, in the judgment:

(1) The judgment permits the MCC to house pretrial detainees and sentenced inmates together in the specialized units (judgment, ¶ 1(a)(i), A 2884), as was the MCC's prior policy and practice;

(2) The judgment requires the MCC to use its best efforts to maintain proper classification and separation in instances when population pressures necessitate exceptions (judgment, ¶ 1(a)(ii), A 2884), as was the MCC's prior policy and practice.

See Respondents' Memorandum, A 2842-47.

Thus, given the facts in this record, the District Court should not have entered any injunctive relief on this issue. The injunction, we submit, represents an unwarranted and unnecessary involvement by the District Court into the operation of the MCC. Recognizing that courts do not sit "to supervise prisons", *Cruz v. Beto*, *supra*, 405 U.S. at 321, but only to correct proven violations of constitutional rights, this Court should vacate the District Court's order.

889 ("At least 85 instances are revealed by the records where inmates have been physically assaulted by other inmates. Twenty-seven of these assaults involved armed attacks in which an inmate was either stabbed, cut or shot.").

B. The District Court Erred in Issuing Injunctive Relief on Social and Family Visiting

1. The Status Quo Injunction

The District Court has asserted that because the MCC sought to reduce visiting hours shortly after it opened and then subsequently expanded visiting hours, a permanent injunction should now be entered requiring that the MCC "not diminish or impair the [visiting program] at any future time except upon a showing of good cause" made to the Court and counsel for appellees (opinion, A 2750; judgment, ¶ 10(h), A 2892). This injunction was unwarranted and should be vacated by this Court.

The changes in the visiting program at the MCC—which the District Court found "striking and unsettling" (opinion, A 2749)—must be considered and judged in their proper context: as Dr. Camp testified, a new institution such as the MCC experiences a shakedown period of approximately 18 months to two years during which the institution and staff "[iron] out the kinks" (Camp Direct, A 1386-91). As the record makes clear, the proposed reduction in the visiting hours which the District Court preliminarily enjoined in January, 1976 was part of a long-evolving plan to provide inmates with an adequate opportunity for visiting and at the same time deal with the unprecedented number of visitors coming to the MCC (Taylor Affidavit, A 128-51; Johnson Affidavit, A 153-55; Taylor Supplemental Affidavit, A 156-61; see Silver Dep., RX-YYY, A 2433-37). Thus, it cannot fairly be concluded that the appellants sought to hide these changes from anyone—including the Court

or appellees' counsel *—as suggested by the District Court.**

The more recent liberalization of the visiting program is again part of the maturation process being experienced by the MCC as it proceeds through its shakedown period. As described by Warden Taylor, the expanded schedule of visiting was adopted by the MCC after considerable discussion and review and was designed to strike a proper balance between the desire, on the one hand, to maximize the opportunity for visits and, on the other, the realities of limited staff resources, security and other program demands and needs at the MCC (Taylor Direct, A 1220-21; see generally *id.*, A 1208-19). The revised schedule provides the following opportunities for visiting:

* Although the District Court stated that since communications to and from the MCC are "scarcely instantaneous", 406 F. Supp. at 1245, counsel for petitioners did not receive notice of the proposed change in the visiting schedule until sometime after the formal notices had been posted in the living units on January 13, 1976, the undisputable proof is to the contrary. Counsel knew of the proposed changes even *before* the notices were posted; in paragraphs 59 and 61 of the amended petition dated January 12, 1976 and filed on January 13, 1976 by counsel for the appellees, some of the essential parts of the proposed changes were described—visiting rooms would be open 2½ hours per day (§ 59) rather than 3 hours, and inmates would have 2 one-hour visits per week (§ 61) rather than 3 visits of up to 3 hours each.

** Since this issue arose in the proceeding for a preliminary injunction on visiting hours which was decided on a paper record without any live testimony, this Court is free to draw its own conclusions on this matter. *Forts v. Ward*, *supra*, slip op. at 580 n.8. See e.g., *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, *supra*, 558 F.2d at 1093-94; *State of New York v. Nuclear Regulatory Commission*, *supra*, 550 F.2d at 750-53.

<i>Days</i>	<i>Hours</i>	<i>Unit</i>
Tuesday- Friday*	12:30PM to 4:00PM 5:30PM to 8:30PM	All Units
Saturday	8:30AM to 12:00PM 12:30PM to 4:00PM	3, 7N, 7S, 11N, 11S, 2, 5N, 5S, 9N, 9S, 11S
Sunday	8:30AM to 12:00PM 12:30PM to 4:00PM	2, 5N, 5S, 9N, 9S, 11S 3, 7N, 7S, 11N, 11S

Even under the previous visiting schedule, inmates at the MCC were averaging at least one- or two-hour visits three times per week. (Parker Cross, Trial Transcript p. 502; Gardner Direct and Cross, A 495, 544; Seiller Cross, A 951-52; Miller Cross, A 887-88). With the expanded hours—which went into effect after the conclusion of the trial—it can reasonably be expected that the average length of visits will increase since problems of overcrowding in the visiting rooms should decrease for visitors will have a greater span of time available to them during which to visit with inmates. (See Nagel Direct, A 709; Rundle Direct, A 774-75).

The District Court concluded that this visiting program is reasonable and constitutionally adequate and, indeed, suggested that it may very well exceed the minimum required by the Constitution (opinion, A 2750). See *Duran v. Elrod*, 542 F.2d 998, 1000 (7th Cir. 1976); *Rhem v. Malcolm*, *supra*, 389 F. Supp. at 971, and 396 F. Supp. at 1196-98. Notwithstanding this finding, the District Court embodied the present visiting schedule in a permanent injunction, justifying this action on the ground that such an order "should constitute no additional

* The District Court was incorrect in stating that there would also be morning visiting during the week (opinion, A. 2749).

burden" (opinion, A 2750, citing *Zurak v. Regan*, 550 F.2d 86, 95 (2d Cir. 1977)).

In the circumstances of this case, this injunction is improper and the citation to *Zurak* is misplaced. As the Fifth Circuit recently stated in *Newman v. State of Alabama*, *supra*, 559 F.2d at 291 in vacating an injunction entered by a district court on visiting procedures, "visitation regulations should be left to the prison authorities, wisely adopted to individual circumstances if their sound discretion should dictate, or included in general rules which will allow prisoners reasonable visitation". The District Court's action here—essentially turning a preliminary injunction into a permanent injunction—without any finding of unconstitutional conduct * violates the well-recognized principle that courts should not assume a permanent supervisory role over the administration of prison affairs. See *Cruz v. Beto*, *supra*, 405 U.S. at 321. Cf. *Todaro v. Ward*, Dkt. No. 77-2095, slip op. 145, 155 and n.7 (2d Cir., Oct. 31, 1977).

2. The Visiting Room Bathrooms

Contrary to the District Court's conclusion (opinion, A 2751), appellants fail to see how the MCC's practice of controlling access to the visiting room bathroom by requiring a visitor to ask the visiting room officer to unlock the bathroom door can properly be construed as an "annoyance" or an "indignity", particularly when

* The District Court never reached the merits of the visiting program on the preliminary injunction motion, 406 F. Supp at 1248-49. Furthermore, we believe that the decisions in *Rhem v. Malcolm*, *supra*, 389 F. Supp. 964 and 396 F. Supp. 1195, clearly demonstrate that the prior visiting schedule, as well as the proposed one which the District Court enjoined, met or surpassed the constitutional minimum.

such key-control is commonly used in society-at-large (e.g., service station bathrooms, of buildings). Surely, this arrangement does not rise to a level of seriousness warranting the District Court's prohibition of that system, cf. *Johnson v. Glick, supra*, 481 F.2d at 1033 n.6 and requiring that the bathrooms remain unlocked except when being used by the occupant.*

The District Court's intervention here is especially egregious since, as made clear in Warden Taylor's affidavit (§§ 16-17) submitted on appellants' motion for a stay in this Court, the District Court's "unlocked door" requirement poses serious and immediate security and safety problems at the MCC, affecting inmates, staff and the public at large. Under the District Court's rule, it will now be easier for an inmate to gain access to the bathrooms,** during which time the inmate will be totally unsupervised, for the purpose of attempting to hide drugs or other contraband,*** or otherwise engage in improper conduct (including sexual activity with visitors). Further, it will be easier for an inmate to gain access to the bathroom in order to alter his appearance for the purpose of effecting an escape; indeed, as the District Court acknowledged (opinion, A 2751), prior to key control of the bathrooms one escape occurred this way.

* It is relevant to note that the appellees had not requested this form of relief from the District Court (Post-Trial Memorandum of Law for Petitioners, pp. 288, 301B, ¶ 5, R. 126 (¶ 30) in Dkt. No. 77-2135).

** Although inmates are prohibited from using the visiting room bathrooms, the District Court's order requiring that pre-trial detainees be permitted to wear their own clothes will also make it easier for such inmates to evade this rule. See pp. 101-04 below.

*** This risk will be further increased by the District Court's restrictions on the strip search procedures. See pp. 88-92 below.

In short, the District Court has intruded into matters of safety and security at the MCC and has thus failed to show proper deference to correctional judgment and expertise in these vital areas. *Cf. Todaro v. Ward, supra*, slip op. at 155.

C. The District Court Should Not Have Issued A Status Quo Injunction On Attorney Visiting Procedures

Although conceding, as it must, that the present facilities and procedures for attorney visits at the MCC pass constitutional muster (opinion, A 2754) the District Court nonetheless entered a permanent injunction requiring the MCC to maintain those facilities and procedures.

The facts here simply do not warrant such an order. The voluntary and good faith efforts on the part of the MCC to construct new facilities and revise the procedures for the attorney visiting program at the MCC are clear (Taylor Direct and Cross, A 1205-19, 1297, 1305-06; see MCC Visiting Task Force Recommendations, RX-I, A 1988-94; letter dated January 31, 1977, A 3018-21). Further, there is nothing in the record to even suggest that the MCC will return to the former system for attorney visiting, particularly since it has incurred considerable expense to construct the new facilities and revise the procedures (Taylor Cross, A 1297). As Judge Friendly observed for this Court in a similar context involving a detained juvenile's access to counsel:

But "it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do." *New Standard Publishing Co. v. F.T.C.*, 194 F.2d 181, 183 (4th Cir. 1952).

Negron v. Wallace, 436 F.2d 1139, 1145 (2d Cir. 1971).

D. The District Court Should Not Have Issued A Status Quo Injunction On Telephone Services

After reviewing all the evidence, the District Court held that the telephone services at the MCC were "adequate, if not generous" (opinion, A 2759). Nonetheless, it embodied the terms of its prior preliminary injunction into a permanent injunction (*Id.*, A 2760; judgment, ¶ 13, A 2894-97). Again, appellants submit that this was error.

At the outset it is important to note that the change in telephone services announced in September, 1976—of which the Court and counsel were promptly advised (letter dated September 9, 1976, A 201-02)—was precipitated by a yearly loss exceeding \$90,000 which the New York Telephone Company had incurred as a result of fraudulent long distant telephone calls being made from the coin operated telephones located in the inmate housing units at the MCC (Blair Affidavit, A 227-30; Motion to Vacate, A 214-26). Upon being advised that the Telephone Company intended to remove those telephones from the MCC, the appellants immediately began to negotiate with the Telephone Company in order to devise and implement an alternate system of telephone services for inmates. At all times, counsel for the appellees and the Court were kept fully advised of those negotiations (*e.g.*, letter dated September 9, 1976, A 201-02; letter dated September 17, 1976, A 320-23; Transcript of September 21, 1976, A 334-75; Transcript of September 29, 1976, A 376-430). As the record further makes clear, the appellants made substantial efforts to reach an accommodation with the Court and counsel for appellees in devising a system of alternate telephone services (*Id.*).

In these circumstances, the issuance of a permanent injunction was unwarranted. There is nothing in the

record to indicate that the level of telephone services has ever fallen below the constitutional minimum. Nor is there any evidence that the MCC intends to change the system of telephone services currently employed at the MCC. The District Court's statement that "[i]t follows that the court should embody the terms of the preliminary injunction in the final decree" (opinion, A 2760) is thus inexplicable and, indeed, wrong.* *Negron v. Wallace, supra*. Should at some future time, the MCC propose to change telephone services at the MCC, then will be time enough for the affected parties and, if necessary, a court to determine whether the changes comport with the MCC's constitutional duties. In the interim, the Court should not, as it has done here, assume and retain a supervisory position over the operation of the MCC. See *Cruz v. Beto, supra*, 405 U.S. at 321; *Newman v. State of Alabama, supra*, 559 F.2d at 292 where the Fifth Circuit stated that the District Court "should remove itself from prison operations at the earliest date consistent with the vindication of constitutional rights. . . ."

* As appellants reiterated to the District Court, the fact that they did not appeal from the District Court's preliminary injunction or subsequently seek to change the level of telephone services is irrelevant to whether the terms of the preliminary injunction should be embodied in the final decree. (Respondents' Memorandum, A 2867-68). As we further stated, in our view, given the facts of this case it was improper to enter an order on this matter (*Id.*).

POINT VI**The District Court's Order Regarding Law Library Materials Is Overly Broad and Is In Error**

The District Court found that the law library procedures and materials at the MCC were inadequate (opinion, A 2724-25) and has presently ordered in general terms that the MCC remedy these deficiencies; under this order, the specific form of the remedy is to be formulated by the appellants and thereafter implemented after notice to the appellees and approval by the Court (*Id.*, A 2724; judgment, ¶ 4, A 2886-88).

On this appeal, the appellants do not challenge, as a general matter, the District Court's ruling regarding physical access to a law library* (judgment, ¶ 4(a), A 2886-87). The appellants believe, however, that the District Court erred in the following respects: First, the legal materials presently available in the MCC law library satisfy the applicable constitutional standard and therefore the District Court was wrong in requiring the MCC to make further acquisitions (opinion, A 2725 n.17; judgment, ¶ 4(c)(ii), A 2887). Second, the District Court erred in requiring the MCC to provide inmates with access to state law materials (*Id.*). Those errors, we submit, must be corrected by his Court.

The contents of the MCC law library (Exh. VIII-6 to the Stip. of Facts, A 2597-600), meet the applicable constitutional standard. A complete set of the U.S. Supreme Court Reporter is contained in the law library; the Federal Second series goes back to 1962 (Volume 300)

* As the District Court made clear, the contours of reasonable access are yet to be determined by the District Court (opinion, A 2724; judgment, ¶ 4(a), 2886-87).

and the Federal Supplement series goes back to 1961 (Volume 200). In addition, portions of the United States Code Annotated, including title 18 and sections of title 28 regarding habeas corpus, and supplementary research tools are also contained in the library.* These materials, we submit, are entirely adequate. The District Court's order that the MCC extend the Federal Supplement and Federal Second series back to 1950, and acquire additional statutory and general research volumes goes far beyond what the constitution may properly be thought to require. See *Bounds v. Smith*, 45 U.S.L.W. 4411, 4412 n.4 (U.S., May 26, 1977) in which a law library containing substantially the same federal law materials as those at the MCC was included as part of the State of North Carolina's court-ordered plan, which was affirmed by the Supreme Court, to provide adequate legal materials to inmates. See also *Gaglie v. Ulibarri*, 507 F.2d 721, 722 (9th Cir. 1974).

Finally, appellants are unaware of any support, either constitutional or otherwise, for the District Court's requirement that the MCC, a federal jail, must provide inmates with access to state law materials.** In view of the relatively short length of stay of inmates at the MCC, and the fact that inmates there may have cases in the courts of any and every state of the United States, the appellants should not be required to devise and implement access procedures as directed by the District Court.

* The District Court stated that there were some inaccuracies in the stipulated list of legal materials (opinion, A. 2725 n.17). The only inaccuracy in Exh. VIII-6 of which appellants are aware regards the inclusion of "Federal Cases—Volume 1 to 300".

** Since *Bounds v. Smith*, *supra*, involved a North Carolina state institution it is not surprising that the plan approved there included state-law materials.

POINT VII

The District Court's Restrictions on the Procedures For Strip Searches and Room Searches Are Improper and Should Be Reversed

The District Court's order prohibiting visual genital and anal inspections as part of the strip search procedures after contact visits (judgment, ¶ 16, A 2898-99) and requiring that, absent exceptional circumstances, pretrial detainees be present during searches of their rooms (*id.*, ¶ 17, A 2899-900) adversely affects the safe and secure operation of the MCC and should be reversed by this Court.

A. Genital and Anal Inspection of Inmates After Contact Visits Is Constitutional

In prohibiting the MCC from conducting visual anal and genital inspections after contact visits, the District Court has substituted its judgment for the expertise and experience of responsible correctional administrators who have concluded that this procedure is vitally important to the safety and security of inmates and staff, and the institution as a whole. The District Court's decision represents a substantial break with the overwhelming weight of authority that such an inspection does not violate an inmate's constitutional rights. *E.g.*, *Daugherty v. Harris*, 476 F.2d 292 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973), *Bell v. Manson*, 427 F. Supp. 450 (D. Conn. 1976); *Hodges v. Klein*, 412 F. Supp. 896 (D.N.J. 1976); *Giampetruzzi v. Malcolm*, 406 F. Supp. 836 (S.D. N.Y. 1975); *Penn El v. Riddle*, 399 F. Supp. 1059 (E.D. Va. 1975); *Gettleman v. Werner*, 377 F. Supp. 445 (W.D. Pa. 1974); *Bijeol v. Benson*, 404 F. Supp. 595 (S.D. Ind. 1975).

The decision in *Frazier v. Ward*, 426 F. Supp. 1354, 1366 (N.D.N.Y. 1977) relied on by the Court below is clearly distinguishable from this case. In *Frazier*, the District Court cited approvingly to the injunction issued in *Hodges v. Klein*, 412 F. Supp. 896 (D.N.J. 1976) which provided that "[a]n inmate's anal cavity may be visually inspected after a personal contact visit with a friend or relative" 426 F. Supp. at 1366. However, in the subsequent order issued in *Frazier*, a copy of which appellees' counsel provided to the District Court and appellants' counsel, the District Court failed to provide for a similar exception. Given the stringent, and virtually absolute control and observation over inmates that the prison authorities in *Frazier* exercised before, during and after contact visits, 426 F. Supp. at 1362-63,—which is quite different from the situation at MCC—the subsequent order there has no application here.

The documented instances in this record (Cardamone Direct, A 1442; see *id.*, A 1447-50) and elsewhere, *United States v. Parks*, 521 F.2d 1381, 1382 (9th Cir. 1975),* of attempts to secrete drugs into an institution through hiding them in a body cavity such as the anus or female genitalia demonstrate the need for such strip searches; moreover, the deterrent effect of these searches cannot be doubted (opinion, A 2768; Camp Direct, A 1404-08, Carlson Direct A 1682-83). In this context, the reasoning of the Court in *Bell v. Manson*, 427 F. Supp. 450, 452 (D. Conn. 1976)—a case not cited by the District Court in its opinion—is persuasive:

* The Joint Committee on the Legal Status of Prisoners of the American Bar Association has concluded that prisoners do "conceal weapons and other contraband in this manner" and that "There is clear evidence that truly dangerous weapons can be concealed in these cavities." American Criminal Law Review, *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, p. 534. Although it has recommended more limited use of strip searches, it has nonetheless conceded that its position "diverges most dramatically with current case law" (*Id.*, p. 533).

Under the circumstances of this case, the Court finds that strip and rectal searching is not unreasonably designed to promote the security and internal order of the Center. This type of search enables correctional officers to thwart attempts by returning inmates to smuggle in drugs, money, weapons and other items of contraband which may be small enough to be concealed in a body cavity. Moreover, the detainee's knowledge that such a search will be conducted has a beneficial deterrent effect. Under these circumstances, the prison officials' interest in maintaining proper security outweighs the inmates' rights to be free from the embarrassing submission to strip searches upon their return from court appearances and other outside visits.*

Moreover, the risks here will be increased should the MCC be required to implement the District Court's orders regarding access to the bathrooms in the visiting rooms and uniforms. See pp. 81-83 above and pp. 101-04 below.

The one incident cited by the District Court (opinion, A 2767) in which an officer was alleged to have threatened an inmate during a strip search (Miller Direct, A 870) does not establish that correctional officers at MCC have engaged in a pattern of unacceptable conduct in conjunction with these searches necessitating any broad remedial relief. Indeed, in all the conversations that Dr. Rundle, appellees' psychiatrist, had with inmates not once did any inmate advise him of any snide or deroga-

* The fact that *Bell* involved such searches upon return to the institution after court appearances does not distinguish that case from the situation here. In both situations, the critical factor is that inmates are coming into contact with individuals from outside the institution who may well be conduits for dangerous contraband.

tory comments by staff during a strip search (Rundle Cross, A 806-07). Given the substantial safety and security needs which underlie the use of the strip search procedure, it is particularly inappropriate to enjoin the use of strip searches as a general matter in order to deal with such an isolated problem.* As the Court noted in *Gates v. Collier*, *supra*, 407 F. Supp. at 1121:

... in achieving constitutional compliance no Court is bound to invoke draconian measures, particularly when another course, less drastic and already initiated, seems more likely to produce satisfactory results.

Further, the Court has set an almost impossible "probable cause standard" as a predicate to the limited use of the full strip search procedure (opinion, A 2770). Since this "probable cause" must be based on first-hand sworn statements, the MCC may never be able to meet this test. Much of the information the institution receives relating to contraband comes from inmates and, because of the inmate code which frowns upon informers, and the fear of reprisals, it will be difficult if not impossible to secure the necessary affidavits from inmates. Moreover, the Court's standard is not at all comparable to the "reasonably clear indication" standard devised in *Hodges v. Klein*, 412 F. Supp. 896 (D.N.J. 1976) which upheld the strip search as used here but required a "reasonably clear indication" of concealment of contraband in order to justify a strip search in other situations. See *Fraizer v.*

* Individual complaints can be properly and adequately remedied by the inmate bringing the problem to the attention of the unit management staff or the warden as Glenn Miller did when a new officer mistakenly advised Miller that he would have to submit to a strip search prior to a visit (Miller Direct, A 870).

Ward, supra, 426 F. Supp. at 1366 which quotes from the injunction issued in *Klein*.*

B. The District Court Erred In Requiring That Pre-trial Detainees Be Present, Except Under Special Circumstances, During A Search of Their Rooms

During a formal unit shakedown, when a particular portion of a residential unit is cleared of inmates and a search is conducted, inmates are not permitted to watch searches of their rooms; during the less formal searches which are conducted more often, correctional officers have the discretion to permit an inmate to stand at the doorway of his room to observe the search (Stip. of Facts, ¶¶ XIII-1 and 2, A 2548; opinion, A 2771). The District Court has now ordered that, in the absence of special circumstances, pretrial detainees must always be permitted to observe searches of their rooms (judgment, ¶ 17, A 2899-900). This order poses a serious obstacle to effective and timely implementation of this critically important security procedure.

As the Warden testified, requiring that inmates always be present in the area of a search would result in possible distraction to the officers, conflicts between inmates and officers over the search, and attempts by inmates to move contraband (Taylor Direct, A 1240-41). Roberts Wright ** also testified to that danger and gave his expert opinion that the policy of not permitting inmates to observe formal unit searches is in keeping with accepted correctional practices in detention facilities (Wright Direct, A 1545-46). Drs. Menninger and

* In objecting to the District Court's standard and pointing to alternate standards appearing in the case law, appellants reiterate that the use of strip searches in this case is constitutional without reference to the "probable cause" or "reasonably clear indication" standards.

** A correctional expert called by appellants.

Bowen added that if seen as rational and necessary and if equitably administered, this policy would not cause an intolerable level of stress for inmates (Menninger Direct, A 1610; Bowen Direct, A 1717-18).

The District Court stated that correctional officers were not always neat in conducting these searches, and that suspicion on the part of inmates that correctional officers were stealing personal property was a source of tension and hostility (opinion, A 2771). The record, we submit, does not support the significance which the District Court apparently attributed to these matters in ordering relief. As to the alleged disarray of an inmate's possessions following a search, Officer Norman, a witness called by appellees, testified that most correctional officers do try to return the rooms to their original condition (Norman Direct, A 1034). Likewise, Dr. Camp testified that the room searches which he observed were conducted in a very professional manner (Camp Direct, A 1413-14). As to inmates' suspicion of thefts,* appellees' psychiatric expert conceded on cross-examination that much of his testimony about distrust between staff and inmates "is really based upon an opinion which I hold from general knowledge of prisons, not specifically this one", that he was aware of no evidence that valued personal possessions of inmates at the MCC had ever been seized and that, indeed, none of the inmates with whom he spoke had even mentioned that particular fear to him (Rundle Cross, A 799-800).**

The legal analysis which underlies the District Court's order here is also in error. As the appellees admitted

* It is important to note that the District Court did *not* make a finding that correctional officers had engaged in such conduct (opinion, A. 2771).

** Since January, 1977, pursuant to the District Court's summary judgment order, the MCC is required to give a receipt when seizing an inmate's possession.

below,* there is no authority for the proposition that persons outside of jail have a constitutional right to observe a lawful search of their premises. It would seem to follow from this that neither pretrial detainees nor sentenced inmates have a constitutional right to be present during a search of their rooms within a detention facility. Indeed, the Supreme Court in *Lanza v. New York*, 370 U.S. 139, 143 (1962), has cast considerable doubt whether a search in detention center can ever be "unreasonable" within the meaning of the Fourth Amendment:

But to say that a public jail is the equivalent of man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and as, of course, may an apartment. An automobile may not be unreasonably searched. Yet, without attempting either to define or predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison official surveillance has traditionally been the order of the day. (footnotes omitted)**

* Post-Trial Memorandum of Law for Petitioners, p. 388n. R. 126 (§ 30) in Dkt. No. 77-2135.

** Cf. *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2540-44; *Stroud v. United States*, 251 U.S. 15 (1919). In *Hoitt v. Vitek*, 361 F. Supp. 1238, 1255 (D.N.H. 1973), the Court relied on the above-quoted language from *Lanza* and held that inmates had no reasonable expectation of privacy in their cell-blocks. Other courts have held that inmates retain some

[Footnote continued on following page]

See *Smith v. Shimp*, *supra*, 562 F.2d at 426 n.2. The contrary decision in *Giampetruzzi v. Malcolm*, 406 F. Supp. 836 (S.D.N.Y. 1975) relied upon by the District Court is, we submit, wrong. *Giampetruzzi* contains no reasoned analysis leading to its conclusion and, indeed, relies upon a purported right of privacy which the Supreme Court in *Lanza* has strongly implied is non-existent in a jail.

Furthermore, the District Court's refusal to defer to appellants' professional judgment regarding the necessity and propriety of the search practices at the MCC is clear error. As the Supreme Court stated in *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2539 in a related context:

Without a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order." *Id.*, at 944-95. Rather "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell v. Procunier*, 417 U.S., at 827. The necessary and correct result of our deference to the

minimal right to privacy under the Fourth Amendment which may be overridden by reasonable searches undertaken in furtherance of the institution's interest in security. *E.g.*, *Bonner v. Coughlin*, 517 F.2d 1311, 1316-17 (7th Cir. 1975); *United States v. Savage*, 482 F.2d 1371, 1372-73 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Palmigiano v. Travisano*, 317 F. Supp. 776, 791-92 (D.R.I. 1970).

informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

In sum, the District Court's ruling is wrong on the law and improperly intrudes on the legitimate security and safety judgments made by the responsible correctional authorities.

POINT VIII

The District Court's Assertion of Authority To Grant Relief Regarding Commissary Privileges, Personal Typewriters, Personal Property, and Uniforms Is Error and Should Be Reversed

Asserting statutory authority to act, the District Court has ordered changes in MCC's policies and practices and regarding commissary privileges (judgment, ¶ 6, A 2888-89), personal typewriters (*id.*, ¶ 5, A 2888) and other personal property (*id.*, ¶ 19, A 2901), and uniforms (*id.*, ¶ 20, A 2901-02). As discussed in detail above, pp. 19-25, the District Court does not have statutory authority to involve itself in these matters. Moreover, as discussed below, the facts here demonstrate that no constitutional rights have been violated and the District Court's intervention was unwarranted.

A. Commissary Privileges at MCC Are Reasonable and The District Court's Intervention is Unwarranted

The MCC's practice of providing inmates with commissary services once a week is reasonable and proper and the District Court's order (judgment, ¶ 6(a), A 2888) requiring commissary services on an every-other-day basis—without exceptions for holidays, weekends or

for taking inventories—is unreasonable and an unwarranted intrusion into the operation of the institution.

The MCC provides all inmates, free of charge, with personal hygiene items: "toothpaste, soap, toilet paper, shaving cream, a razor, razor blades, a comb and a toothbrush . . . [and] female inmates are issued sanitary napkins, a feminine hygiene syringe and douch powder" (Stip. of Facts, ¶ XV-2, A 2552). Since the basic health and comfort needs of inmates are being met by this practice, the commissary is serving as a supplement. Thus, the inmates' need for commissary services more than once per week can not fairly be deemed substantial. Certainly, the inmates' possible desire for additional services cannot justify the Court's requirement of every-other-day service with *no exceptions* for holidays (e.g., Thanksgiving, Christmas, New Year), weekends, or during quarterly inventories. The commissary services required by the District Court's order will most assuredly create administrative burdens for the MCC and require further staff allocations.*

The management and staff allocation judgments that underlie the MCC's commissary policy is an area of discretion which properly resides with correctional administrators and not the courts. *Cf. Newman v. State of Alabama, supra*, 559 F.2d at 291. Since, as the District Court conceded (opinion, A 2733), no constitutional right of inmates are even arguably implicated here, and it cannot fairly be said that the well-being of inmates is endangered, the District Court should have deferred to appellants' judgment. *See Rhem v. Malcolm, supra*, 432

* See Warden Taylor's affidavit (¶ 27) submitted to this Court on appellants' motion for a stay.

F. Supp. at 777-78; *Tate v. Kassulke*, 409 F. Supp. 651, 662 (W.D. Ky. 1976).*

B. The District Court Should Not Have Ordered Any Relief Regarding Personal Typewriters

Conceding that inmates do not have a constitutional right to a typewriter (opinion, A 2726), the District Court nonetheless enjoined further enforcement of the MCC's rule which prohibits inmates from possessing personal typewriters. Given the absence of statutory authority for a court to intervene in such matters, *see pp. 19-25 above*, this order should be reversed.

Moreover, the MCC is providing inmates with adequate access to typewriters. At least one typewriter is available on each residential unit (opinion, A 2726; Stip. of Facts, ¶ VIII-4, A 2542), and, as the record shows, inmates have had a reasonable opportunity to use them to prepare legal papers (*see Gardner Cross*, A 548; *RX-B and C*, A 1976-85). Given these facts, the MCC's judgment that the problems of security, storage, theft or damage and administrative burden—which arise whenever inmates possess personal property (*Taylor Direct*, A 1242; *Wright Direct*, A 1550-51; *Carlson Direct*, A 1686) outweigh the desire of some inmates to possess personal typewriters should properly be given conclusive deference. *See Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2539.

* Although appellants also dispute the District Court's statutory authority to order the relief set forth in paragraph 6(b) through 6(e) and paragraph 15 of the judgment, appellants will voluntarily continue to implement those measures should this Court reverse those aspects of the District Court's order.

C. The District Court Erred In Requiring the MCC to Permit Inmates to Receive Packages from Outside the Institution

Relying upon its alleged statutory powers of review and supervision (opinion, A 2780), the District Court has also enjoined appellants' rule that prohibits inmates at MCC from receiving packages from outside the institution. Dismissing appellants' security, sanitation and administrative concerns as unsupported "dire predictions" (opinion, A 2779), the District Court has labelled the prohibition as arbitrary and capricious. The facts and law, again, fail to support the District Court's actions here.

There was convincing testimony as to the need for the MCC's restrictions on the possession of personal property. In the first place, to permit inmates to receive packages greatly increases the opportunities for the introduction of weapons, money, and especially drugs (Taylor Direct, A 1242; Wright Direct, A 1550-51; Carlson Direct, A 1686). Although metal detection devices can reduce this risk with respect to weapons, they are obviously useless as to money and drugs. Indeed, as to these items, even visual or manual inspection may not be effective; money or drugs sewn into the lining of clothes or secreted in foodstuffs can easily be overlooked. Furthermore, as the Warden testified, the inspection process itself can become an enormous drain on limited staff resources (Taylor Direct, A 1242). Where, as here, the issue does not infringe on any constitutional right, that factor is surely entitled to significant consideration. See *Guajardo v. Estelle*, 432 F. Supp. 1373, 1386 (S.D. Tex. 1977) in which the District Court there upheld a correctional facility's prohibition on packages.

In addition, the introduction of personal property into jails, especially money or valuable items, provides the

material for buying favors among inmates or between inmates and staff, for gambling activities, and for the use of strong-arm tactics and other similar types of activities which are well-known and of real concern to correctional administrators (Taylor Direct, A 1242-43). The presence of such property also increases the risk of thefts and of conflicts by creating or aggravating the factor of economic inequality within the jail (Taylor Direct, A 1243; Wright Direct, A 1548-49). *See Holt v. Hutto*, 363 F. Supp. 194, 210 (E.D. Ark. 1973), *rev'd on other grounds sub nom. Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974) (prohibition on possession of money upheld).

Finally, the introduction of food packages into the MCC would inevitably create sanitation and storage problems (Taylor Direct, A 1242; Wright Direct, A 1550).

That the potential already exists at the MCC for at least some of these dangers or problems, *see* opinion, A. 2780-81, does not mean that these concerns are not legitimate or that appellants are therefore somehow prohibited from taking reasonable measures to control or reduce those risks. *See Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2539-40. Moreover, whatever inconvenience this prohibition on packages may cause inmates is mitigated by their relatively short average stay at the MCC and the presence of a commissary.*

The District Court therefore erred by failing to take full measure of all of these factors and, in the final analysis, by failing to defer to the informed discretion of the

* Since the District Court has permitted the appellants to limit the items in the court-ordered packages to "the kind available on order from the commissary" (opinion, A 2782), the order provides little, if any, practical expansion of the personal items an inmate may possess at the MCC. It thus needlessly increases the administrative burdens on the proper operation of the MCC.

appellants. As the Supreme Court recently stated in *Jones v. N. C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2542 n. 3:

The informed discretion of prison officials that there is a potential danger may be sufficient for limiting rights even though this showing might be "unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public." *Pell v. Procunier*, 417 U.S. at 825.

D. The District Court Exceeded Its Authority By Prohibiting Uniforms for Pretrial Detainees and Modifying the Uniform Requirement for Sentenced Inmates

Inmates at the MCC are not permitted to wear their own clothing but rather are required to wear uniforms which consist of a one-piece jumpsuit (Stip. of Facts, ¶ XVI-2, A 2554).^{*} This policy is founded on security needs, for uniforms are necessary to identify inmates and to readily distinguish them from staff and visitors, especially in a short-term detention facility such as the MCC with its rapid rate of turnover (Taylor Direct, A 1244; Camp Direct, A 1410; Carlson Direct, A 1685).^{**}

The District Court rejected this security concern, characterizing the MCC's uniform requirement as arbitrary and capricious (opinion, A 2785), and enjoined

^{*} The one exception to that policy is that inmates are permitted to retain their own shoes to wear while at the MCC (Stip. of Facts, ¶ XVI-1, A 2554).

^{**} As the Director of the Bureau of Prisons pointed out, because of this security consideration, uniforms are required at virtually all federal correctional facilities (Carlson Direct, A. 1684).

its enforcement as to pretrial detainees and modified the requirement as to sentenced inmates (judgment, ¶ 20, A 2901-02). This decision, again, fails to give proper deference to appellants' judgment and expertise.

A uniform requirement for sentenced inmates clearly passes constitutional muster. See *Blake v. Pryse*, 444 F.2d 218 (8th Cir. 1971); *Brooks v. Wainwright*, 428 F.2d 652 (5th Cir. 1970); *Winsby v. Walsh*, 321 F. Supp. 523 (C.D. Cal. 1971).^{*} Likewise, the constitutionality of requiring detainees to wear uniforms is supported by the cases upholding reasonable regulations pertaining to personal appearance even outside of jails. In *Kelley v. Johnson*, 425 U.S. 238 (1976), the Supreme Court reversed the decision of this Court in *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) and held that the hair regulations of the Suffolk County Police Department did not violate the constitutional rights of the members of that police force. The Supreme Court assumed without deciding that personal appearance is a "liberty interest" protected by the Fourteenth Amendment, as this Court had held. It went on to find, however, that the challenged regulation was justified by the state's interest in the discipline and esprit de corps of its police force and in easy public recognition of policemen. 425 U.S. at 246-48. See *East Hartford Education Ass'n v. Board of Education, etc.*, Dkt. No. 76-7005, slip op. 5331 at 5341-47 (2d Cir. Aug. 19, 1977) (*en banc*).

The District Court's citation to *Forts v. Malcolm*, 426 F. Supp. 464 (S.D.N.Y. 1977) in rejecting the appellants' security rationale and prohibiting uniforms for detainees is misplaced. In *Forts*, as the Court specifically found, the City sought to justify its policy of prohibiting women to wear slacks "solely [on] administrative con-

^{*} The District Court recognized this (see opinion, A 2785-86).

venience", 426 F. Supp. at 468. Here, in contrast, the appellants' justification is anchored in legitimate security concerns about which this Court has stated that correctional judgments are entitled to deference. *Todaro v. Ward*, *supra*, slip op. at 155.*

In addition, the District Court's dislike of the jumpsuit used at MCC simply cannot justify its intervention. Although several inmates testified that the jumpsuits were not to their taste, Doctors Menninger and Bowen agreed that their use cannot be said to create any emotion problems for inmates (Menninger Direct, A 1613; Bowen Direct, A 1714-15). Moreover, the Director of the Bureau of Prisons testified that the jumpsuits were chosen precisely to "provide the greatest degree of normalcy in the institution and at the same time to identify [those] in custody" (Carlson Direct, A 1684). While the District Court may dispute the correctness of that choice, it is clearly a management decision which is within the discretion accorded by law to the appellants. As the Court stated in *Newman v. State of Alabama*, *supra*, 559 F.2d at 287 "The remedy must be designed to [correct unconstitutional conditions], not to exercise judicial power for the attainment of what we as individuals

* The cases relied upon by the appellees in the District Court are similarly inapposite here. In *Seale v. Manson*, *supra*, 326 F.Supp. at 1380-81, no claim was made that the regulation forbidding beards was related to the need to make prompt identification of inmates. And in *Marion County Jail Inmates v. issue* was personal identification, not the issue of distinguishing inmates from staff and visitors, and unlike *Smith*, there is weighty evidence here as to the need for uniforms to serve that purpose. *Broderick*, No. IP 72-C-424 (S.D. Ind., June 9, 1975), Order at 2-3, the Court merely required that inmates be permitted to retain their own underwear and to wear their own clothes to court. Only in *Smith v. Sampson*, 349 F.Supp. 268, 272 (D.N.H. 1972) did the Court reject the need for inmate identification in striking down a regulation prohibiting long hair and beards. However, there the

might like to see accomplished in the way of ideal prison conditions." *Cf. Ornato v. Hoffman*, 546 F.2d 10, 13 (2d Cir. 1976); *Johnson v. Glick*, *supra*, 481 F.2d at 1033 n.6.

POINT IX

The District Court's Refusal To Except Clearly Identifiable Institutional Property from the Receipt Requirement is Unreasonable and Should Be Reversed

On appellees' motion for summary judgment, the District Court ordered the MCC to provide receipts when seizing property in the possession of inmates. 428 F. Supp. at 342; summary judgment order, ¶ 3, A 3066). At the time the District Court formulated the summary judgment order, the appellants requested inclusion of an exception to this rule for seized items which belong to the MCC (letter dated January 13, 1977, A 3045-46). That request was denied. (See summary judgment order, ¶ 3, A 3066). Subsequently, in settling the judgment after trial, the appellants again requested an exception as to "institutional property such as silverware, plates, or excess amounts of institutional clothing or linen" (Respondents' Memorandum, A 2872-73; see judgment ¶ 18, A 2900-01. See also letter dated June 30, 1977, A 3029-30). Again, that request was denied.

On this appeal, appellants challenge only the District Court's refusal to provide an exception to the receipt and due process requirements of the judgment (¶ 18) and the summary judgment order (¶ 3) for clearly identifiable institutional property.* In light of the absence of any

* We wish to note that the detailed requirements of the "due process" ordered by the District Court are yet to be determined by the District Court (opinion, A 2778; judgment, ¶ 18, A 2900).

property interest of inmates in the institutional property that they are permitted to use, the refusal to provide for this exception is reversible error. An inmate's entitlement to a receipt each time a correctional officer, for example, seeks to collect silverware or dishware not returned after a meal can not fairly be deemed substantial. Permitting the appellants this limited exception is, we submit, reasonable and consistent with the basic objectives of a system for receipts and due process. *Cf. Cruz v. Ward*, 558 F.2d 658, 663 (2d Cir. 1977); *Powell v. Ward*, 542 F.2d 101, 104 (2d Cir. 1976).

POINT X

The District Court Erred By Enjoining The Publisher Only Rule

The District Court enjoined enforcement at the MCC of the Bureau-wide "publisher-only" rule (summary judgment order, ¶ 2, A 3065-66), finding appellants' security reasons inadequate. 428 F. Supp. at 340. Given the "relatively large MCC library", *id.*, and the District Court's failure to defer to appellants' legitimate and substantial security concerns, this Court should reverse the District Court's order and enter summary judgment in appellants' favor.*

Prior to the District Court's order, pursuant to a Bureau-wide policy, the MCC permitted inmates to receive books and other publications from outside the institution only if the item came directly from the publisher or a book club. As the Warden stated in his affidavit on the summary judgment motion, this rule is followed

* See pp. 69-70 above on the power of this Court to direct entry of summary judgment.

since receipt of such material, except directly from the publisher or book club, poses substantial security risks and problems of administrative manageability (Taylor Affidavit, ¶¶ 9-11, A 90-92). See pp. 98-101 above. In addition to this system for inmate access to outside reading material, the MCC maintains the "relatively large" library referred to by the District Court. 428 F. Supp. at 340; see opinion, A 2727; Harris Affidavit dated October 19, 1976, ¶ 3, A 102; Exh. VIII-9 to the Stip. of Facts, (A 2601-52).*

Given all of these factors, the "publisher only" rule is reasonable and consistent with legitimate operational considerations of the MCC. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, *supra*, 97 S. Ct. at 2540-42. Indeed, the Bureau's policy has specifically been upheld in *Woods v. Daggett*, 541 F.2d 237 (10th Cir. 1976). See *Gua-jardo v. Estelle*, *supra*, 432 F. Supp. at 1884-85; *Berman v. Bell*, Civil No. 77-354, Memorandum, (M.D. Pa., Sept. 6, 1977). The District Court's attempt to distinguish *Woods* is unpersuasive. On matters such as the control of contraband into a short term detention center, security concerns and the problem of administrative manageability are not significantly different from those experienced at a long-term prison. Moreover, as the District Court acknowledged, a short-term institution such as MCC typically does not have much background information on detainees (opinion, A 2710), which is particularly significant at the MCC given the relatively high average bail of detainees there (approximately \$60,000) and the broad range of charges pending against them including air piracy, bank robbery and narcotics violations (RX-VV, A 2077-78).

* Although appellees tried to raise some claims at trial concerning access to the materials in this library, the credible evidence in the trial record is that access is reasonably available (Harris Direct, A 1339-45; RX-AA, A 2042).

Further, in *Rhem v. Malcolm*, *supra*, 371 F. Supp. at 620, the Court stated in enjoining the City's publisher only rule that the "burden" of the rule

... might not be great if the institution supplied books, periodicals and newspapers in reasonable number...

In that case, however, the Court concluded after trial that

... two court inspections of the printed material available to inmates at MHD established decisively that the number of books or other items is grossly insufficient in relation to the number of inmates (and the average length of stay) and that the material which is available (*i.e.*, "Yachting" magazine) is largely irrelevant to the interests of the defendants [*sic*]. 371 F.Supp. at 620.

Here, the situation is quite different. The library is "relatively large", periodicals are provided, newspapers are sold, and in general, inmates remain at MCC for relatively short periods of time. In short, the burden, if any, of the publisher only rule is "not . . . great", and the District Court's order should be reversed.

POINT XI

The District Court Was Wrong as a Matter Of Law in Prohibiting The MCC From Reading Non-legal Mail

Without referring to either *Procunier v. Martinez*, *supra*, 416 U.S. 396, or *Wolff v. McDonnell*, *supra*, 418 U.S. 539, the District Court prohibited the MCC from following the Bureau-wide policy* of scanning, on a random basis or spot-checking, incoming and outgoing personal mail. Those cases support the MCC's practice and the District Court's order should be reversed. *Smith v. Shimp*, *supra*, 562 F.2d 423; *Guajardo v. Estelle*, *supra*, 432 F. Supp. at 1381-84; *Berman v. Bell*, *supra*.

* Bureau of Prisons Policy Statement 7300.1A, ¶ 6b, A. 39-40.

At the outset, it is important to note that this case does not involve censorship or direct restraints on the exercise of First Amendment rights; at no point in these proceedings have appellees presented any evidence even to suggest this. Additionally, it should be noted, the spot-checking procedure serves the vital interest of institutional security (Policy Statement 7300.1A, ¶ 6, A 39-40).*

Although the District Court characterized appellants' justification of this practice as trivial, 428 F. Supp. at 343, a fair reading of *Procunier, supra*, and *Wolff, supra*, fully supports appellants' position. In *Prounier*, the Supreme Court, in recognizing the authority of prison officials to engage in limited censorship of prisoner mail in order to further the "identifiable governmental interests" in the "preservation of internal order and discipline", necessarily recognized the authority of prison administrators to inspect and read such mail. 416 U.S. at 412-14. The Court in *Wolff v. McDonnell, supra*, implicitly confirmed this by noting in the context of a prison case that "freedom from censorship is not equivalent to freedom from inspection or perusal." 418 U.S. at 575-76. Moreover, *Procunier* can not be distinguished from this case on the basis that it did not involve the rights of innocent pretrial detainees, since the Supreme Court in *Procunier* made clear that its decision there was based upon the First Amendment rights of non-prisoner correspondents, 416 U.S. at 407-14. See *Guajardo v. Estelle, supra*, 432 F. Supp. at 1381-84.

The recent decision of the Seventh Circuit in *Smith v. Shimp, supra*, is directly on point and confirms the

* We wish to advise the Court that the Bureau is presently considering a revision of its policy in this area, whereby spot-checking or monitoring would be undertaken, as a general matter, only as to incoming, non-privileged mail. Under this proposed revision, the Bureau would retain authority to monitor outgoing mail.

authority of correctional officials to spot check non-privileged mail of pretrial detainees. As the Court stated in *Smith, supra*, 562 F.2d at 423:

We conclude that the interest of the state in monitoring the non-privileged correspondence of the pretrial detainees justifies the minor burden that it places on their freedom to communicate with friends and relatives.

In reaching this conclusion, the Court confirmed in strong terms the vital security interest that a detention facility has in monitoring non-privileged correspondence of detainees:

We may take judicial notice of the fact that an opportunity for secret and lengthy communication between a detainee and his friends or relatives would substantially enlarge his opportunity for successful escape. We have no doubt that over the course of time some persons would take advantage of that opportunity. *Cf. Wolff v. McDonnell, supra*, 418 U.S. at 577, (proof not required to establish possibility that letters, including those from apparent attorneys, might contain contraband). Accordingly, we conclude that unmonitored use of nonprivileged detainees' mail does pose a genuine threat to jail security. *Id.* at 426.

Further, the Court concluded that the burden on detainees imposed by spot-checking was no greater than necessary to protect the interest in jail security (*Id.*).

Thus, the District Court's order here enjoining the spot checking of inmate mail (summary judgment order, ¶ 4, A 3066) must be reversed.

POINT XII**The District Court Should Not Have Entered Any Order Regarding Exercise in Administrative Detention**

The District Court has ordered that inmates in administrative detention shall normally be provided with one hour of outdoor exercise per day, and that in the event such outdoor exercise is not provided, the affected inmate shall be informed, in writing, of the reasons thereof by a member of the executive staff of the MCC (opinion, A 2791-92; judgment, ¶ 22, as amended, A 2903; *see* Memorandum, A 2920-21). Appellants submit that the District Court's order is an unwarranted intrusion into the operations of the MCC.

MCC Policy Statement 7400.5D (Stip. of Facts, Exh. X-2, A 2653-84)* provides that an inmate in administrative detention—confinement to a residential room or a room in the maximum security unit pending a hearing on a disciplinary report (*id.*, A 2668)—“[t]o the extent possible” should be afforded

the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, . . . exercise periods exceeding those provided for inmates housed in Disciplinary Segregation will be provided (*Id.*, A 2669).

Disciplinary segregation consists of confinement to a room in the maximum security unit as a result of a disciplinary hearing (*id.*, A 2670); two hours of exercise per week are provided to inmates in disciplinary segregation.

* Derived from Bureau of Prisons Policy Statement 7400.5D (RX-SSS, A 2378-406).

The District Court's statement that these regulations "should mean . . . that people in administrative detention will normally have a daily hour of outdoor exercise plus the kinds of physical workouts possible with equipment in the units" (opinion, A 2792) cannot withstand analysis. Although allowing inmates in administrative detention to have the same commissary privileges and the same amount of personal property as inmates in the general population may be fully consistent with "existing resources available and the security needs of the unit", that is certainly not the case regarding exercise. Since an inmate is placed in administrative detention because "his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution" (MCC Policy Statement 7400.5D, A 2668), to allow the inmate to go to the roof-top recreation area when the rest of the unit goes, or generally to allow the inmate to use the exercise equipment on the unit as the other inmates do would seriously undermine the purpose and necessity of placing the inmate in detention. To require, in the alternative, that such recreational opportunities be provided separately to inmates in administrative detention would seriously stretch staff resources. (Taylor Affidavit on Motion to Amend Judgment, ¶¶ 4-5, A 2914-15).

Because of these matters, the Warden testified at trial that inmates in administrative detention do not always receive outdoor recreation (Taylor Cross, A 1294). However, prior to the District Court's decision, the MCC undertook to expand staff resources in the unit used for administrative detention in order to provide, as a normal practice, that inmates there receive outdoor exercise five times per week (Taylor Affidavit, A 2913-15; see the District Court's Memorandum dated October 28, 1977, A 2920-21). These steps by the MCC more than meet the requirements of the applicable policy statement, and the District Court should not have intervened to require

"written reasons" based on "staff resources", "security" or other "compelling reasons" for providing less than one hour of outdoor exercise on a daily basis. *Cf., Cruz v. Ward, supra*, 558 F.2d at 663.

CONCLUSION

For all of the foregoing reasons, it is respectively requested that this Court reverse the District Court as to the matters set forth in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, and 22 of the judgment of October 13, 1977, as amended and enter judgment in appellants' favor, and further, reverse the District Court as to the matters set forth in paragraphs 1, 2, 3 and 4 of the summary judgment order dated January 19, 1977 and enter summary judgment in appellants' favor.

Dated: New York, New York
December 6, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondents-
Appellants.*

LOUIS G. CORSI,
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Of Counsel.*

APPENDIX

APPENDIX A

(Data Derived From Stip. of Facts, ¶ 1-1, A 2496-527)

Unit	Common Space		Number of Inmates	Common Space per Inmate	Sleeping Space* per Inmate	Total Living Space per Inmate
Honor Unit	Corridors (3 x 298.97 sq. ft.)	896.91				
	Multipurpose Area	674.97				
	Pantry	86.3				
	Total	1,658.18 sq. ft.	21	78.96 sq. ft.	98.5 sq. ft.	177.45 sq. ft.
Unit 3	Corridors (3 x 339.35)	1,018.05				
	Multipurpose Room	1,497.9				
	Recreation Room and Corridor	352.64				
	Pantry	365.71				
	Total	3,234.3 sq. ft.	24	134.76 sq. ft.	75.9 sq. ft.	210.66 sq. ft.
5-South	Corridors (3 x 295)	885				
	(3 x 319.77)	959.31				
	Multipurpose Room	1,649.52				
	Recreation Room	278.99				
	Education Area	919.84				
	Pantry	520.78				
	Total	5,213.44 sq. ft.	48	108.61 sq. ft.	75.9 sq. ft.	184.51 sq. ft.
5-North	Corridors (3 x 399.35)	1,018.05				
	(3 x 364.12)	1,092.36				
	Multipurpose Room	1,649.52				
	Recreation Room	278.99				
	Education Area	919.84				
	Pantry	520.78				
	Total	5,479.54 sq. ft.	48	114.16 sq. ft.	75.9 sq. ft.	190.06 sq. ft.
7-South	Corridors (3 x 339.35)	1,018.05				
7-North	(3 x 364.12)	1,092.36				
9-South	Multipurpose Room	1,649.52				
9-North	Recreation Room	278.99				
11-North	Education Area	919.84				
	Total	4,958.76 sq. ft. (each unit)	48 (each unit)	103.31 sq. ft.	75.9 sq. ft.	179.21 sq. ft.
11-South	Multipurpose Room	1,723.83				
	Recreation Room	278.99				
	Education Area	919.84				
	Total	2,922.66 sq. ft.	120	24.36 sq. ft.	43.25 sq. ft.**	68.61 sq. ft.

* The square footage figures for sleeping space in each of the units except Unit 11-South (the Dormitory) are for the smallest residential room within each unit.

** The sleeping space per inmate in this unit (Dormitory Unit) is computed by aggregating the square footage in each of the six dorm rooms (5189.52 sq. ft.) and dividing that number by 120 inmates:

$$864 \text{ sq. ft.} \times 6 \text{ dorm rooms} = 5189.52 \text{ sq. ft.} \div 120 = 43.25 \text{ sq. ft.}$$

APPENDIX B

(Data Derived From Government's 9(g) Statement, ¶ 1-1, A 51-81)

Unit	Common Space		Double Bunked Capacity	Common Space per Inmate	Sleeping Space per Inmate	Total Living Space per Inmate
Honor Unit	Corridors (3 x 298.97)	896.91				
	Multipurpose Area	674.97				
	Pantry	86.3				
	Total	1,658.18 sq. ft.	35	47.38 sq. ft.	98.5 sq. ft.	145.88 sq. ft.
					101.91	149.29
					103.3	150.68
					Single-bunked rm	
					47.31 sq. ft.	104.69 sq. ft.
					57.39	104.77
					57.56	104.94
					57.58	104.96
					57.71	105.09
					57.92	105.3
					58.6	105.98
					59.22	106.6
Unit 3					61.45	108.83
					80.23	127.61
					Double-bunked rm	
					47.31 sq. ft.	104.69 sq. ft.
					57.39	104.77
					57.56	104.94
					57.58	104.96
					57.71	105.09
					57.92	105.3
					58.6	105.98
					59.22	106.6
					61.45	108.83
					80.23	127.61
					Single-bunked rm	
					47.31 sq. ft.	104.69 sq. ft.
					57.39	104.77
7-North					57.56	104.94
					57.58	104.96
					57.71	105.09
					57.92	105.3
					58.6	105.98
					59.22	106.6
					61.45	108.83
					80.23	127.61
					Double-bunked rm	
					47.31 sq. ft.	104.69 sq. ft.
					57.39	104.77
					57.56	104.94
					57.58	104.96
					57.71	105.09
					57.92	105.3
					58.6	105.98
9-North					59.22	106.6
					61.45	108.83
					80.23	127.61
					Single-bunked rm**	
					47.31 sq. ft.	104.69 sq. ft.
					57.39	104.77
					57.56	104.94
					57.58	104.96
					57.71	105.09
					57.92	105.3
					58.6	105.98
					59.22	106.6
					61.45	108.83
					80.23	127.61
					Double-bunked rm	
					47.31 sq. ft.	104.69 sq. ft.

* Although Unit 3 has a capacity for 48 individuals (24 rooms double-bunked), the MCC had placed a limit of 40 as the maximum number of inmates to be housed there at any one time. (Taylor Affidavit, ¶ 4, A 126). Although on a few occasions in the past that went as high as 41, the average for the months just prior to the Court's ruling was 37 (*Id.*).

** For this unit, the square footage figures are for the smallest room within the unit (*i.e.*, 75.9 sq. ft.).

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies

9th day of December 19 77 she served/~~excopy~~ of the
within Appellant's Brief

by placing the same in a properly postpaid franked envelope addressed:

Phyllis Skloot Bamberger, Esquire
The Legal Aid Society
Criminal Appeals Bureau
U. S. Courthouse
Foley Square
New York, New York 10007

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marion L. Bryant

9th day of December, 19 77

Pauline P. Troia
PAULINE P. TROIA
 Notary Public, State of New York
 No. 31-4632381
 Qualified in New York County
 Commission Expires March 30, 1978